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In the Supreme Court of the United States

OCTOBER TERM, 1997

CITY OF CHICAGO,
Petitioner,
v.
JESUS MORALES, ET AL.,
Respondents.

On Writ of Certiorari to the Supreme Court of Illinois

BRIEF OF *AMICI CURIAE* NATIONAL DISTRICT ATTORNEYS ASSOCIATION AND INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE IN SUPPORT OF PETITIONER CITY OF CHICAGO

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Pursuant to this Court's Rule 37.3, *amici curiae* National District Attorneys Association, Inc. ("NDAA") and International Association of Chiefs of Police, Inc. ("IACP") respectfully submit this brief urging this Court to reverse the judgment of the Supreme Court of Illinois and to hold that Chicago Municipal Code § 8-4-015 is consistent with the Due Process Clause of the Fourteenth Amendment.[1]

INTEREST OF *AMICI CURIAE*

The NDAA is the sole organization representing local prosecuting attorneys across the United States. Since its founding in 1950, the NDAA's programs of education,

[1] This brief is filed with the consent of both petitioner and respondents, and letters reflecting those consents have been lodged with the Clerk of this Court. Pursuant to this Court's Rule 37.6, *amici curiae* NDAA and IACP state that this brief has not been authored in whole or in part by counsel for a party and that no person or entity, other than *amici*, their members, or their counsel, have made a monetary contribution to the preparation or submission of this brief.

training, publication, and *amicus curiae* activity have carried out its guiding purpose of reforming the criminal justice system for the benefit of all citizens. NDAA members are responsible for the vast majority of criminal prosecutions in this country, and are at the front line in attempting to combat the serious problems presented by the violent and lawless activities of criminal street gangs. Members of the NDAA have long shared the concern that sufficient means be developed to reduce the alarming trend of gang violence in our Nation's cities, and the NDAA strongly believes that localities should be permitted to employ creative approaches to fighting gang-related criminal activity. The NDAA therefore has a compelling interest in the outcome of this case.

The IACP is the largest organization of police executives and line officers in the world, consisting of more than 16,000 members in 96 nations. Through its programs of training, publications, legislative reform, and *amicus curiae* advocacy, it seeks to make the delivery of vital law enforcement services more effective, while at the same time protecting the rights of all our citizens. Members of the IACP have an important responsibility to protect the communities they serve from the dangers posed by criminal street gangs, and measures such as the Chicago ordinance at issue in this case are a valuable contribution to that effort. The IACP therefore has a vital interest in this case.

SUMMARY OF ARGUMENT

In recent years, criminal street gangs—groups comprised of dangerous criminals joined together in a highly cohesive organizational structure—have become an increasingly serious problem plaguing our Nation's cities. Because maintenance of "turf" is vital to a gang's unlawful aims, gang members regularly engage in loitering in order to claim territory, to recruit new members, and to intimidate rival gangs members and area residents.

Chicago Municipal Code § 8-4-015 attempts specifically

to address the problem of gang loitering. The first sentence of § 8-4-015(a) authorizes a police officer to order a group of loiterers that he or she has probable cause to believe contains a criminal street gang member "to disperse and remove themselves from the area." The second sentence of that section requires those individuals promptly to comply with such an order. Neither sentence is vague.

Although vagueness doctrine "focuses both on actual notice to citizens and [on] arbitrary enforcement," this Court has observed that "the more important aspect of the vagueness doctrine" is the requirement that sufficient standards be provided to channel the discretion of law enforcement officers. *Kolender* v. *Lawson*, 461 U.S. 352, 358 (1983). Moreover, in evaluating whether the first sentence of § 8-4-015(a) is vague, the question necessarily focuses on whether the ordinance sufficiently cabins police discretion. Because the first sentence does not require any citizen to do anything unless and until a dispersal order is issued, the only question of "fair notice" raised by this sentence is whether the ordinance, as a general matter, adequately limits police discretion in "words of common understanding." *Boos* v. *Barry*, 485 U.S. 312, 332 (1988).

The ordinance adequately limits police discretion to issue dispersal orders. The ordinance defines "loiter" as "to remain in one place with no apparent purpose." *See* § 8-4-015(c)(1). This term is sufficiently limited to avoid the problems concerning the quite different ordinances at issue in *Shuttlesworth* v. *City of Birmingham*, 382 U.S. 87 (1965), and *Papachristou* v. *City of Jacksonville*, 405 U.S. 156 (1972), which were drafted in such broads terms that they could have been applied to literally *anyone* on the streets. Here, the definition of "loitering" sets a specific, objective test: a person has no "apparent purpose" for remaining in one place if a reasonable person viewing the person's behavior under the circumstances would not perceive a reason why that person is remaining in one place.

The Chicago ordinance imposes further substantial

limits on the discretion of police officers by providing that a dispersal order may be issued to a group of loiterers only if it contains at least one person whom the officer "reasonably believes to be a criminal street gang member." The ordinance contains a detailed definition of "criminal street gang" that provides the sort of objective criteria that were missing from the very broad definition of "gang" that was found to be vague in *Lanzetta* v. *New Jersey*, 306 U.S. 451, 457 (1939). Moreover, the ordinance does not permit officers randomly to label anyone they want as a "member" of a criminal street gang; rather, they must have objective probable cause of gang membership.

In any event, if further narrowing were required, it is more than adequately supplied by the additional restrictions of the Chicago Police Department's General Order 92-4, which implements the ordinance. The lower court simply refused to consider the Order, reasoning that federal vagueness doctrine required that the necessary narrowing of discretion be done entirely by the city's legislature. This holding is flatly contrary to this Court's cases. *See, e.g.*, *Ward* v. *Rock Against Racism*, 491 U.S. 781, 795-96 (1989).

The second sentence of §8-4-015(a), which requires citizens promptly to obey a dispersal order, is also not impermissibly vague. The standard of conduct defined by this sentence—that persons who receive a dispersal order must "remove themselves from the area"—is not vague under this Court's cases. *See Cox* v. *Louisiana*, 379 U.S. 536, 551 (1965) ("move on" order "is narrow and specific").

The Illinois Supreme Court went further, however, and held that the ordinance must also, in effect, ensure that a citizen has a sufficient factual basis to evaluate whether the order has been properly issued. This latter requirement finds no support in the cases of this Court. Statutes prohibiting resisting arrest, for example, have never been thought to be vague simply because the arrestee may not comprehend all of the facts that comprise the officer's probable cause to arrest. In any event, the ordinance here

provides sufficient guidance for avoiding a police order to disperse: refrain from loitering with gang members.

The lower court also invalidated the ordinance on the ground that it violates "substantive due process," holding that the ordinance effected an "arbitrary" deprivation of the "personal liberty interests" in freedom of movement and in associating with others. In so ruling, the lower court erred.

Although the lower court declined to consider whether the ordinance infringed "*fundamental* rights," it is clear that it does not do so. Although this Court long has recognized a right to travel from state to state and abroad, and has at times referred more loosely to a "constitutional right to freedom of movement," *see Kolender*, 461 U.S. at 358, it is clear that there is no generalized fundamental right to be free of all restrictions upon one's physical movement. Nor does the ordinance implicate fundamental rights of association. *See City of Dallas* v. *Stanglin*, 490 U.S. 19, 24 (1989).

Assuming *arguendo* that the court below was correct in concluding that the ordinance implicates "liberty interests" that comprise a "substantive component of the Due Process Clause," the interest asserted is at best a narrow one—the right to remain in a public place after having been asked to move on by an officer who reasonably believes that the group of loiterers includes at least one criminal street gang member. For several reasons, the ordinance does not arbitrarily infringe this "liberty interest."

First, the burden imposed by the ordinance is the fairly modest one of moving on when ordered to do so. Second, the ordinance clearly furthers a legitimate state interest by regulating a behavior—gang loitering—that the city has found to be *both* harmful in its own right (because it intimidates residents) *and* likely to lead to the commission of more serious crimes. Third, by targeting gang loitering, the ordinance provides a "reasonable fit" with those legitimate interests. *Reno* v. *Flores*, 507 U.S. 292, 305 (1993).

ARGUMENT

A. Chicago's Gang Loitering Ordinance Is a Targeted Response to the Very Real Problems Posed by Criminal Street Gangs

1. The Deleterious Effects of Loitering by Street Gang Members Are Well Documented

In recent years, criminal street gangs have become an increasingly serious problem. All too often, one hears of another drive-by shooting in which an innocent bystander is killed; another "turf" battle that leaves one or more teenage gang members dead; or another neighborhood in which gang members regularly harass and intimidate residents. *See, e.g.*, Tamaki, *Boy's Slaying In 'Good' Area Stuns Family*, L.A. Times, June 15, 1998, at A1; *2 Teens Charged In Gang Shooting*, Chi. Trib., June 14, 1998, at 3.

The statistics are staggering. A recent study indicates that gangs are active in all 50 States, and that over 650,000 young men and women are active in over 25,000 gangs. *See* Press Release, U.S. Dept. of Justice, Office of Juvenile Justice and Delinquency Prevention, *New Survey Finds 25,009 Youth Gangs With More Than 650,000 Members* (June 20, 1996). Another study has shown that, in 1992, those gangs committed over 46,000 crimes, including over 1,000 homicides. Curry et al., *Gang Crime And Law Enforcement Recordkeeping*, Nat'l Inst. for Justice, U.S. Dept. of Justice (June 1994). Gangs "now operate in cities of all sizes, as well as suburban communities throughout the United States." U.S. Dept. of Justice, Bureau of Justice Assistance, *Urban Street Gang Enforcement* (Jan. 1997).

The gang problem is particularly acute in major cities. In Chicago, for example, the four largest street gangs—which include the Gangster Disciples, the Latin Kings, the Latin Disciples, and the Vice Lords—exercise control over large sections of the city. Statement of Steven R. Wiley, Chief of FBI's Violent Crimes and Major Offenders Section,

before the U.S. Senate Comm. on the Judiciary, Apr. 23, 1997 ("Wiley Statement"). In 1994, 26 percent of all homicides in Chicago were gang-related. *Rodriguez Praises Police and Community for Continued Crime Reduction*, 1995 Crime and Murder Analysis News Conference (Jan. 4, 1996) ("Rodriguez Statement"). As the court below recognized, gangs "are responsible for a variety of criminal activity, including drive-by shootings, drug dealing, and vandalism." Pet. App. 2a.

Today's gangs cannot be confused with the charming band of youths that harassed Officer Krupke in *West Side Story*. Modern-day street gangs are comprised of dangerous criminals who are joined together in a highly cohesive organizational structure. In this regard, the Department of Justice has identified five criteria that distinguish gangs from other groups: (1) formal organizational structures; (2) identifiable leadership; (3) identification with a territory; (4) recurrent interaction; and (5) a history of engaging in serious or violent criminal activity. *See* U.S. Dept. of Justice, Office of Juvenile Justice and Delinquency Prevention Fact Sheet # 12. Their members commit crimes at rates far exceeding those of the population generally, and recidivism rates among gang members are inordinately high. *See* Wiley Statement, *supra*.

For the criminal street gang, "turf" is currency. By physically dominating the streets of a neighborhood, gangs are able to establish lucrative monopolies over the drug trade in those areas. "Area co-ordinators" for gangs like the Gangster Disciples wield control over a square mile or more of a neighborhood, conscripting teams of "soldiers," "runners," and "look-outs" to distribute drugs, recruit new members, avoid police detection of criminal activity, and keep rival gangs out of the area. *There Are No Children Here*, Economist, Dec. 17, 1994, at 21.

Because possession and maintenance of turf is the *sine qua non* of gang existence, gangs routinely position small groups of members in strategic locations throughout their

respective territories to signify, both to community members and to would-be rivals, that those areas belong to them. These groups of gang members loitering on street corners are magnets for violence, as posturing between members of rival gangs often ends in gunfire. Indeed, most gang violence is the "product of old-fashioned fights over turf, status and revenge . . . ." Wiley Statement, *supra*.

Traditional law enforcement methods have proven ineffective in controlling the spread of gang activity. *See* Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 Va. L. Rev. 349, 375 (1997); NDAA, *Resource Manual and Policy Positions on Juvenile Crime Issues* 18-20 (Nov. 1996). Rather, measures and enforcement strategies targeted specifically at the unique problems presented by gangs are essential. *Id.* Accordingly, communities throughout the country are testing various approaches to addressing the problem of street gangs. In California, for example, courts have issued nuisance injunctions against gang activities. *See generally People ex rel. Gallo v. Acuna*, 14 Cal. 4th 1090, *cert. denied*, 117 S. Ct. 2513 (1997).

The common theme motivating these law enforcement approaches to gang activity is the desire to *prevent* violent crime through prophylactic measures administered by local police officers and local prosecutors in close cooperation with community members who are most aware of the problems at hand. These measures are part of a broader trend in law enforcement, involving community policing and community prosecution. Livingston, *Police Discretion And The Quality Of Life In Public Places: Courts, Communities, And The New Policing*, 97 Colum. L. Rev. 551, 561 (1997). According to community policing theory, law enforcement efforts are most successful when "police are a visible presence in communities, oriented toward crime prevention and problem-solving, and working toward partnership with communities." *Id.* at 563. Dispersing gang members who loiter in public areas, either through the enforcement of injunctions or through the issuance of orders to "move on,"

sends a clear message that the community will no longer tolerate gang intimidation and disorder. Kahan, *supra*, at 376. These measures reduce the opportunities for gang members to maintain "turf," to recruit new members, to intimidate residents, and to commit serious crimes.

2. Chicago's Ordinance Is a Targeted Response to the Problems Posed by Gang Loitering

During the hearings that led to passage of Chicago's gang loitering ordinance, witnesses from the community and the police department testified about the specific problems created by gang loitering. As summarized by the Illinois Supreme Court, this testimony established that "gang members loiter as part of a strategy to claim territory, recruit new members, and intimidate rival gangs and ordinary community residents." Pet. App. 2a. Because of the central role that loitering plays in maintaining a gang's control over an area, and the inherent intimidation that such loitering causes to neighborhood residents, the City Council concluded that an ordinance targeted specifically at that conduct was necessary to address these unique problems. *Id.* at 60a-61a.

Accordingly, the City Council enacted an ordinance adding a new § 8-4-015 to the Chicago Municipal Code that directly addresses gang loitering. Subsection (a) provides that "[w]henever a police officer observes a person whom he reasonably believes to be a criminal street gang member loitering in any public place with one or more other persons, he shall order all such persons to disperse and remove themselves from the area." Pet. App. 61a. In order to limit the discretion of police officers to issue such dispersal orders, the ordinance provides specific definitions of the terms "loiter" and "criminal street gang." "Loitering" is defined, not as "standing" *simpliciter* or "wandering around with no lawful purpose," *cf. Shuttlesworth* v. *City of Birmingham*, 382 U.S. 87, 90 (1965); *Papachristou* v. *City of Jacksonville*, 405 U.S. 156, 156 n.1 (1972), but as "remain-[ing] in any one place with no apparent purpose." *See*

§ 8-4-015(c)(1), Pet. App. 61a. "Criminal street gang" is defined with a high degree of specificity to ensure that the term can be applied only to those particular organized groups that represent the core of the modern-day "street gang" phenomenon. Specifically, § 8-4-015(c)(2) defines a "criminal street gang" as an "ongoing organization, association in fact or group of three or more persons" that has as one of its "substantial activities" the commission of one or more enumerated felonies, and "whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity." Pet. App. 61a-62a. "Criminal gang activity" is further defined to mean the commission of certain enumerated felonies "with the specific intent to promote, further, or assist in any criminal conduct by gang members." *See* § 8-4-015(c)(3), Pet. App. 62a.

At the time that the ordinance was being considered, the Chicago Police Department informed the City Council that, if the measure were adopted, the Department would promulgate implementing regulations that would provide further specific guidance concerning enforcement of the ordinance. Pet. 4-5 (citing record). Accordingly, after the ordinance was enacted, the Department issued General Order 92-4, which provides several detailed guidelines for its enforcement. First, the Order requires the Department to identify, using certain specified types of reliable information, those specific gangs that operate in Chicago. Pet. App. 66a-67a. Second, the Order provides that determinations concerning who is and is not a "criminal street gang member" within the meaning of the ordinance may be made only on the basis of "specific, documented and reliable information," such as the person's admission of gang membership, his or her wearing of "distinctive emblems, tattoos, or similar markings," the person's use of signals distinctive to a particular street gang, or information from a reliable informant that the person is a member of a specific street gang. *Id.* at 67a-68a. The Order specifically prohibits an officer from establishing gang membership based solely on the wearing of "clothing available for sale to the general

public." *Id.* at 67a. Third, the Order limits the geographical locations in which the ordinance can be enforced to those specific areas of the City that have been formally designated by the Department as involving significant gang activity. *Id.* at 68a-69a. Fourth, the Order provides that only members of the Department's "Gang Crime Section" and other specially designated officers are eligible to make arrests under the ordinance. *Id.* at 65a.

During the period that the Chicago ordinance was enforced, it was very successful. In 1995, the last year before the ordinance was struck down, gang-related murders declined by over 25 percent. Rodriguez Statement, *supra*. By contrast, during the first year after the ordinance was invalidated, gang-related homicides *rose* by 11%. Pet. 9 n.5. These statistics confirm Professor Livingston's prediction that the invalidation of such laws would "seriously impair[] legitimate community efforts to enhance the quality of neighborhood life." Livingston, *supra*, at 561.

B. The Illinois Supreme Court Erred in Concluding That the Chicago Gang Loitering Ordinance Was Unconstitutionally Vague

The Illinois Supreme Court's decision below rests upon a fundamental misunderstanding of how the vagueness doctrine applies in the context of an ordinance requiring compliance with a police order. As explained below, the doctrine in this context has two requirements. First, the police officer's power to issue an order must be circumscribed according to objectively defined criteria. Second, the substantive content of the orders authorized by the ordinance must be sufficiently clear so that the citizen toward whom the order is directed can determine what must be done to comply with it and so that the officer may evaluate the citizen's compliance according to objective criteria. The ordinance is this case easily satisfies these requirements. In its analysis, however, the Illinois Supreme Court effectively created a third requirement—namely, that the ordinance must ensure that the citizen has sufficient

knowledge to permit him or her independently to evaluate whether the officer was empowered to issue the command. This novel requirement finds no support in this Court's cases, and would lead to demonstrably absurd results.

1. The Requirements of the Vagueness Doctrine

The Due Process Clause of the Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const., amend. XIV, § 1. "'The touchstone of due process is protection of the individual against arbitrary action of government.'" *Daniels* v. *Williams*, 474 U.S. 327, 331 (1986) (citation omitted). Accordingly, the protections afforded by this clause have long been held to include a requirement that laws and regulations set forth their commands with sufficient clarity. "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned* v. *City of Rockford*, 408 U.S. 104, 108 (1972); *see also Kolender* v. *Lawson*, 461 U.S. 352, 357 (1983). This requirement protects against two related evils. First, "[v]ague laws may trap the innocent by not providing fair warning" as to what is expected of citizens. *Grayned*, 408 U.S. at 108. Second, '[a] vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with attendant dangers of arbitrary and discriminatory application." *Id.*

Although vagueness doctrine thus "focuses both on actual notice to citizens and [on] arbitrary enforcement," this Court has observed that "the more important aspect of the vagueness doctrine," *Kolender*, 461 U.S. at 357-58, is the requirement that sufficient standards be provided for enforcement and that the determination of what constitutes a violation not be left to "'the moment-to-moment judgment of the policeman on his beat,'" *Smith* v. *Goguen*, 415 U.S. 566, 575 (1974) (citation omitted).

While due process requires some degree of definiteness,

this Court has cautioned that "we can never expect mathematical certainty from our language." *Grayned*, 408 U.S. at 110. Thus, "due process does not require 'impossible standards' of clarity." *Kolender*, 461 U.S. at 361 (citation omitted). Rather, an enactment provides sufficient notice if it "give[s] the person of ordinary intelligence a reasonable opportunity to know what is prohibited." *Grayned*, 408 U.S. at 108.

2. The Ordinance Is Not Impermissibly Vague

Section 8-4-015(a) of the Chicago gang loitering ordinance does two things. The first sentence of § 8-4-015(a) authorizes police officers to issue a dispersal order to particular citizens under certain prescribed circumstances. The second sentence requires those individuals promptly to comply with such an order. *See* Pet. App. 61a-63a. In light of the other provisions of the ordinance that define the relevant terms, neither sentence is vague.

a. The Ordinance Adequately Channels The Discretion Of Individual Police Officers To Issue Dispersal Orders

The first sentence of § 8-4-015(a) authorizes a police officer to issue a dispersal order if and only if the officer observes (1) a person whom he or she reasonably believes to be a "criminal street gang member" (2) loitering (3) in a public place (4) with one or more other persons. Pet. App. 61a. If all four of these criteria are met, then a dispersal order may be issued. The Illinois Supreme Court found the first two of these criteria to be impermissibly vague, and it therefore held that the ordinance failed to "discourage arbitrary or discriminatory enforcement." Pet. App. 15a. The lower court plainly erred.

In evaluating whether the first sentence of § 8-4-015(a) is impermissibly vague, the question necessarily focuses on whether the ordinance sufficiently channels the discretion of a police officer to issue such an order. *Shuttlesworth*, 382 U.S. at 90-91; *Boos* v. *Barry*, 485 U.S. 312, 330-32 (1988).

Indeed, unless and until a dispersal order has been issued, § 8-4-015(a) does not require *any* citizen to do *any*thing. Accordingly, questions of fair notice do not arise until after the order has issued, and those questions are addressed below. *See infra* at 23-27.

This Court has made clear that enactments that wholly fail to provide individual police officers with any objective guidelines for issuing dispersal orders are unconstitutional. For example, in *Shuttlesworth*, this Court considered the constitutionality of a conviction obtained under an ordinance that made it an offense "'*to stand* or loiter upon any street or sidewalk . . . after having been requested by any police officer to move on.'" 382 U.S. at 90 (emphasis added; citation omitted). This Court observed that, literally read, this provision "says that a person may stand on a public sidewalk in Birmingham only at the whim of any police officer of that city." *Id.* This Court concluded that the literal reading, which authorized officers to issue "move-on" orders to anyone *standing* under any circumstances on any Birmingham street, would be unconstitutionally vague. *Id.* at 90 & n.5. This Court noted, however, that the Alabama Supreme Court had read the ordinance more narrowly to permit an officer to order a citizen to move on only when the citizen was blocking free passage on the sidewalk. *Id.* at 91. This Court held that, so construed, the ordinance was constitutional. *Id.*[2]

Similarly, in *Boos* v. *Barry*, this Court addressed a District of Columbia statute that made it unlawful to "'congregate within 500 feet of any [embassy, legation, or

[2] The particular conviction at issue in *Shuttlesworth* occurred two years *before* the Alabama Supreme Court adopted this narrowing construction. 382 U.S. at 91-92. Accordingly, this Court was unable to determine whether Shuttlesworth had been convicted under a literal (and unconstitutional) construction of the ordinance or instead under the more narrow reading later adopted by the Alabama Supreme Court. *Id.* at 92. Because *Shuttlesworth*'s conviction may have rested on the unconstitutional reading, it was reversed. *Id.*

consulate] and refuse to disperse after having been ordered to do so by the police.'" 485 U.S at 329. This Court noted that, "[s]tanding alone, this text is problematic both because it applies to any congregation within 500 feet of an embassy for any reason *and because it appears to place no limits at all on the dispersal authority of the police*." *Id.* at 330 (emphasis added; emphasis in original deleted). This Court found, however, that the narrowing construction adopted by the Court of Appeals sufficiently limited the discretion of the police and cured any vagueness problem. *Id.* at 330-32. Under this limiting construction, the police could issue an order to disperse only where "normal embassy activities have been or are about to be disrupted." *Id.* at 332. This Court held that, so construed, the statute was not impermissibly vague. *Id.*

Construed against this precedent, the ordinance adequately channels the discretion of police officers to issue dispersal orders. Consistent with *Shuttlesworth* and *Boos*, the ordinance does not confer unfettered discretion to order any person standing on the streets of Chicago to move on; rather, it authorizes a dispersal order only when a person whom the officer reasonably believes to be a "criminal street gang" member is "loitering" with one or more other persons. Like the enactments upheld against facial challenges in *Shuttlesworth* and *Boos*, the Chicago ordinance limits its applicability to a specific type of public congregation that has been determined by the city council to present particular harms that warrant the issuance of dispersal orders. *Shuttlesworth*, 382 U.S. at 91; *Boos*, 485 U.S. at 332.

b. The Lower Court Erred In Concluding That The Ordinance Does Not Sufficiently Limit Discretion To Issue Dispersal Orders

Despite these limitations imposed by the terms of the ordinance itself, the Illinois Supreme Court found the ordinance to be vague because, in the court's view, the definitions of the terms "loitering" and "criminal street gang" left "absolute" or "complete" discretion to individual

police officers. Pet. App. 15a-16a. As such, the lower court concluded that the Chicago ordinance suffered from the same defect presented by the literal reading of the *Shuttlesworth* ordinance, namely, that it "allow[s] a person to 'stand on a public sidewalk . . . only at the whim of any police officer.'" Pet. App. 13a (quoting *Shuttlesworth*, 382 U.S. at 90-92). As set forth below, the court erred.

(1) The Ordinance's Definition Of "Loitering" Is Not Vague

The ordinance defines "loiter" as "to remain in one place with no apparent purpose." *See* § 8-4-015(c)(1), Pet. App. 61a. This definition provides sufficient objective guidance to channel a police officer's discretion to issue a dispersal order. "To remain in one place" is hardly a subjective concept, and the lower court did not contend otherwise. *See* Pet. App. 10a. The second element of the definition also is not vague: a person has no "apparent purpose" for remaining in one place if a reasonable person viewing the person's behavior under the circumstances would not perceive a reason why that person is remaining in that place.

The Illinois Supreme Court concluded that this definition was vague because police officers might fail to perceive the purposes of, for example, "a person waiting to hail a taxi, resting on a corner during a jog, or stepping into a doorway to evade a rain shower." Pet. App. 10a. This reasoning is nonsensical. Given that hailing a taxi requires making one's purpose known to *passing cab drivers*, it is unfathomable how the would-be cab rider could possibly fail also to make his or her intentions known to observing police officers. Similarly, the notion that police officers will mistake a sweaty, out-of-breath person dressed in jogging attire as being a purposeless "loiterer" is far-fetched in the extreme. In any event, the fact that the ordinance might be misapplied in certain hypothetical situations does not provide a ground for invalidating it on its face. *See Maynard* v. *Cartwright*, 486 U.S. 356, 361 (1988) ("Vagueness challenges to statutes not threatening First Amendment interests are examined in light of the facts of the case at hand; the statute is judged on an as-applied basis").

The lower court also expressed concern that loitering is a very common activity, and that the ordinance's reference to "loitering" therefore does not provide much of a check against arbitrary sweeps by police officers seeking to "remov[e] 'undesirable persons' from public." Pet. App. 8a; *see also id.* at 14a, 16a-17a. In reaching this conclusion, the lower court construed *Shuttlesworth* and *Papachristou* as standing for the proposition that a "loitering alone" ordinance is void-for-vagueness, Pet. App. 8a, 16a-17a, but neither decision supports that court's view.

As noted above, *Shuttlesworth* involved an ordinance authorizing police officers to order any person *"stand[ing]* or loiter[ing]" on the street to move on. 382 U.S. at 90 (emphasis added). This Court's conclusion that a literal reading of the Birmingham ordinance would be unconstitutional was based, not on the enactment's use of the term "loiter," but on its use of the substantially broader term "stand." *See Id.* ("Literally read, therefore, the second part of this ordinance says that a person may *stand* on a public sidewalk in Birmingham only at the whim of any police officer of that city.") (emphasis added).

In *Papachristou*, the Jacksonville ordinance did not use the term "loitering," but instead prohibited, *inter alia*, "'persons wandering or strolling around from place to place without any lawful purpose or object.'" 405 U.S. at 156 n.1 (quoting Jacksonville Ordinance Code § 26-57). This definition is substantially broader than that used in the Chicago ordinance. Because literally everyone on the streets at some point moves from one place to another, the Jacksonville ordinance's reference to "wandering or strolling" could be applied to virtually anyone. By contrast, not everyone on the public streets "remain[s] in one place" for a significant period of time. Moreover, it is often very difficult to discern the apparent purpose of a person who is *moving* from one place to another, and this Court therefore

properly concluded that "[t]he qualification 'without any lawful purpose or object'" in Jacksonville's ordinance "may be a trap for innocent acts." *Id.* at 164. Where, however, several persons continue to "remain in one place" over time, it is substantially more likely that they will exhibit behavior that demonstrates their connection to that spot and their apparent reasons for continuing to remain there. Additionally, the ordinance in *Papachristou* authorized officers to *arrest and prosecute* persons who were "wandering or strolling"; the Chicago ordinance merely authorizes the police to order such persons to move on. *Cf. Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-99 (1982) (noting that vagueness standards are applied with less stringency where "the consequences of imprecision are qualitatively less severe").[3]

(2) The Ordinance Sufficiently Defines "Criminal Street Gang Member"

In any event, even if a "loitering alone" ordinance were impermissibly vague, the Chicago ordinance imposes further substantial limits on the discretion of police officers by providing that an order to disperse may be issued to a group of loiterers only if that group contains at least one person whom the officer "reasonably believes to be a criminal street gang member." Pet. App. 61a. The Illinois Supreme Court expressed concern that in practice the ordinance would give the police "complete discretion to determine whether any members of a group are gang

[3] Moreover, nothing in this Court's post-*Papachristou* cases supports the lower court's view that all enactments prohibiting loitering *simpliciter* are "doubtlessly unconstitutional." Pet. App. 8a. Indeed, since the decision in *Papachristou*, this Court has granted review in four cases that challenged loitering ordinances, but in none of these cases did the Court reach the question whether the ordinance's definition of "loitering" was impermissibly vague. Three of the cases were decided on other grounds, *see Kolender*, 461 U.S. at 361 n.10; *Stone* v. *Powell*, 428 U.S. 465, 471 n.2 (1976); *Ellis* v. *Dyson*, 421 U.S. 426, 427 (1975), and one was dismissed as improvidently granted, *see New York* v. *Uplinger*, 467 U.S. 246, 247-49 (1984).

members," *Id.*, 15a, but that concern is plainly unfounded.

As noted earlier, *see supra* at 10, the Chicago ordinance contains a specific and detailed definition of "criminal street gang" that ensures that the term can be applied only to the sort of organized and cohesive criminal groups that in contemporary society are commonly understood by all to be "street gangs." As such, the term "criminal street gang" does not refer to some abstract and amorphous concept that may be applied by the police to whomever they wish; on the contrary, it applies to a specific, well documented, and all too familiar social reality of modern-day America. The ordinance's definition thus provides the sort of objective criteria that were missing from the very different definition of "gang" that was found to be vague in *Lanzetta* v. *New Jersey*, 306 U.S. 451, 457 (1939) (invalidating, on vagueness grounds, a "gangster" statute in which "gang" had been construed by the state courts as meaning, *inter alia*, "a company of persons acting together for some purpose, usually criminal"). Indeed, the lower court did *not* contend that the definition of "criminal street gang" in the Chicago ordinance was vague, nor could it.

Similarly, the ordinance does not permit officers randomly to label anyone they want as a "member" of a criminal street gang. As the Illinois Supreme Court noted, the ordinance's requirement that an officer have "a reasonable belief" that a person is a gang member means that the officer must have "probable cause" on this issue. Pet. App. 11a; *see also* Pet. App. 71a (General Order 92-4, construing the ordinance the same way). "Probable cause" exists with respect to a particular fact only if "the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief" that the fact is true. *Ornelas* v. *United States*, 116 S. Ct. 1657, 1661 (1996). Accordingly, the Chicago ordinance requires the police to possess sufficient facts to warrant an *objectively* reasonable belief that an individual is a member of a "criminal street gang" within the ordinance's highly specific meaning of that term.

In light of the objective standards imposed by the ordinance, the Illinois Supreme Court's concern that the ordinance gives officers "complete discretion" to determine gang membership is unfathomable. The court below contended that a probable cause standard "depends solely on the police officer's *subjective* evaluation of the facts of the situation in light of his own experience," Pet. App. 12a (citing *Kolender*, 461 U.S. at 368-69 (Brennan, J., concurring)) (emphasis added), but that is demonstrably untrue, as even the sole opinion cited by the lower court makes clear. What Justice Brennan said in his separate opinion in *Kolender* was not what the Illinois Supreme Court attributed to him; rather, he merely observed, consistent with settled law, that standards such as "probable cause" and "reasonable suspicion" depend "solely on the *objective* facts known to the officers and evaluated in light of their experience." 461 U.S. at 368-69 (emphasis added). The fact that the lower court plainly mis-cited the only authority on which it relied leaves no doubt as to its error. *See Ornelas*, 116 S. Ct. at 1661-62 (noting that probable cause and reasonable suspicion are objective standards).[4] Indeed, if probable cause determinations concerning objective facts were insufficient to channel an officer's discretion, then the entirety of the criminal law would be impermissibly vague. Throughout the course of their duties, officers are required to make probable cause determinations concerning all sorts of facts, and the court below did not identify any basis for believing that the fact of gang membership is not subject to reliable probable cause determinations.[5]

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[4] *See also People v. Agnello*, 259 Cal. App. 2d 785, 792 (1968) (rejecting a vagueness challenge to a similar statute, holding that "[t]he criterion is not what subjectively appears reasonable to the actor whose decision is in question, but what would appear to a reasonable man in the actor's situation to be reasonable.") .

[5] Nor could it have done so. As one commentator has noted, "[g]ang membership is clearly susceptible to articulable, objective, reasonable discernment by well-trained and experienced members of law enforcement." Lassiter, *The Stop And Frisk Of Criminal Street Gang Members*, 14 Nat'l Black L.J. 1, 35 (1995). Gang symbols worn on clothing, gang-specific symbols displayed on tatoos and elsewhere, communications through distinctive hand signals, and efforts generally to demonstrate to passersby their control over their "territorial haunts" all provide trained law enforcement officers with "objective positive evidence marking members of criminal street gangs." *Id.*

The Illinois Supreme Court's holding also appears to rest on the alternative view that the Chicago ordinance fails to cabin police officers' discretion because it permits officers to order *any and all* loitering gang members to move. Pet. App. 16a (stating that the ordinance "could be used to sweep these intolerable and objectionable gang members from the city streets"). In reaching this conclusion, the lower court relied on *Papachristou*, but this case is a far cry indeed from the ordinance presented there. As noted above, the ordinance in *Papachristou* could have been applied to virtually anyone on the streets of Jacksonville, and it therefore was a standardless delegation of authority to individual officers to arrest whomever they wanted. In this case, by contrast, the Chicago City Council made detailed findings, after legislative hearings, that *loitering by criminal street gang members* causes particular, identifiable harms. *See supra* at 9. These detailed findings—which were not questioned by the court below, *see* Pet. App. 2a-3a, 16a-17a, and which are not reasonably subject to question—formed the basis of the City Council's policy decision to authorize police officers to issue dispersal orders only to those groups of loiterers that officers have probable cause to believe contains at least one criminal street gang member. Nothing in *Papachristou* or in the Constitution requires the City Council to narrow police discretion further by identifying in advance some "subset" of gang members who should be permitted to loiter.

c. The Ability of Individual Officers To Issue Dispersal Orders Is Further Limited By The Applicable Implementing Regulations

In any event, if further narrowing were required, it is

more than adequately supplied by the Chicago Police Department's General Order 92-4. As set forth in detail above, *see supra* at 10-11, the Order imposes further significant restrictions on the discretion of members of the Department to enforce the ordinance by, *inter alia*, requiring that enforcement be limited to specific gangs that have been identified, based upon reliable information, as operating in Chicago; requiring that determinations concerning gang membership may only be made on the basis of certain specified types of reliable information, and not on the basis of generally available clothing alone; limiting the areas in which the ordinance can be enforced to those where gangs are active; and limiting the class of officers who are authorized to enforce the ordinance. Pet. App. 65a-71a. These additional restrictions further narrow significantly the discretion of individual officers to issue dispersal orders, and they further ensure that enforcement efforts will be targeted to the specific problem at hand—the congregation of members of identifiable criminal street gangs in neighborhoods where gang violence and other gang-related activities have become a menace to the community. Indeed, the additional restrictions of the Order are so significant that, under this Court's precedents as discussed above, it is impossible to reach any conclusion other than that respondents' vagueness challenge must fail. *Cf. Grayned*, 408 U.S. at 114 ("As always, enforcement requires the exercise of some degree of police judgment, but, as confined, that degree of judgment here is permissible.").

The Illinois Supreme Court did not dispute the foregoing; rather, it refused to consider the General Order *at all*. The court below held that consideration of the order was improper in evaluating a vagueness challenge because "lawmakers may not abdicate their responsibilities for setting the standards of the criminal law" and because "[i]t is the duty of the lawmakers to establish minimal guidelines to govern law enforcement." Pet. App. 15a-16a. This conclusion is plainly in error.

This Court long has held that "'[i]n evaluating a facial challenge to a state law, a federal court must . . . consider any limiting construction that a state court *or enforcement agency* has proffered.'" *Ward* v. *Rock Against Racism*, 491 U.S. 781, 795-96 (1989) (quoting *Hoffman Estates*, 455 U.S. at 494 n.5) (emphasis added). Indeed, in *Hoffman Estates*, this Court rejected a vagueness challenge to a city ordinance targeting purveyors of drug paraphernalia, precisely because the ordinance—*read together with enforcement guidelines promulgated by the local police department*—sufficiently channeled the discretion of the enforcement officers to defeat a facial vagueness challenge. *See* 455 U.S. at 499-504. The lower court erred in failing to consider the Order in deciding respondents' vagueness challenge, and, in light of the Order, that challenge undoubtedly fails.[6]

d. The Ordinance Provides Adequate Notice to Citizens of The Conduct It Requires

The second sentence of § 8-4-015(a) of the ordinance makes it an offense for any person to whom a dispersal order has been issued to fail promptly to obey the order. Pet. App. 61a. This provision is not impermissibly vague.

As noted earlier, an enactment that imposes obligations on a citizen must be sufficiently clear in two senses: it must define its prohibitions "with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and

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[6] The lower court's construction of federal vagueness doctrine as requiring that the narrowing of discretion be done entirely by the city's legislature, rather than by one of its executive agencies, also runs afoul of this Court's repeated admonition that the Constitution does not impose upon States a requirement of separation of powers. *See Highland Farms Dairy, Inc.* v. *Agnew*, 300 U.S. 608, 612-13 (1937). Moreover, even within the federal system of separation of powers, Congress has the power to impose criminal sanctions for violation of administrative regulations, even if those regulations have been promulgated by the agency charged with criminally prosecuting persons who violate them. *Touby* v. *United States*, 500 U.S. 160, 167-68 (1991).

discriminatory enforcement." *Kolender*, 461 U.S. at 357. The only provision of the ordinance that defines a standard of conduct for citizens is the second sentence of § 8-4-015(a), which provides that when a dispersal order is issued to a group of persons under the ordinance, those persons must "remove themselves from the area." Pet. App. 61a.

There is nothing ambiguous about this standard, and the Illinois Supreme Court did not contend otherwise. Indeed, any such claim is squarely foreclosed by this Court's precedents. This Court has previously held that a requirement that a person "move on" when ordered to do so by an officer "is narrow and specific." *Cox* v. *Louisiana*, 379 U.S. 536, 551 (1965) ("*Cox I*"); *see also Colten v. Kentucky*, 407 U.S. 104, 110 (1972) (rejecting vagueness challenge to ordinance that required persons congregating with the intent to cause inconvenience, annoyance, or alarm to comply with a police order "to disperse"). Moreover, the validity of the ordinance's geographical standard, which requires persons to remove themselves "from the area," is confirmed by other decisions of this Court rejecting vagueness challenges to enactments with comparable geographical elements. *See Grayned*, 408 U.S. at 111 & n.17 ("adjacent" to a school is not vague); *Cox* v. *Louisiana*, 379 U.S. 559, 568-69 (1965) ("*Cox II*") ("near" a courthouse is not vague); *see generally Boos*, 485 U.S. at 331.[7]

The Illinois Supreme Court nonetheless concluded that the ordinance failed to provide adequate notice to citizens. Pet. App. 13a. The ordinance was deficient in this regard because, in the court's view, the standards for issuing a

[7] For the same reasons, the geographical standard set forth in the ordinance provides sufficient guidance by which an officer can objectively determine whether a citizen has complied with the dispersal order. As such, the Chicago ordinance avoids the defects of the statute at issue in *Kolender*, which, by requiring citizens to provide "credible and reliable" identification during an investigatory stop, vested "virtually complete discretion in the hands of the police to determine whether the suspect ha[d] satisfied the statute." 461 U.S. at 358.

dispersal order failed adequately to apprise citizens of the circumstances that will lead to the issuance of such an order: "An individual standing on a street corner with a group of people has no way of knowing whether an approaching police officer has a reasonable belief that the group contains a member of a criminal street gang." *Id.* at 11a-12a. This conclusion rests on a fundamental misapprehension of the requirements of vagueness doctrine.

As explained above, the standards set forth in the Chicago ordinance are sufficiently clear to cabin the discretion of individual officers to issue such orders. *See supra* at 13-23. Moreover, because the ordinance and the General Order are published, the citizens of Chicago are on notice that dispersal orders may be issued under the criteria set forth in the ordinance. The Illinois Supreme Court went further, however, and held that, in addition to narrowing the discretion of police officers, informing the public at large of the applicable standards under which dispersal orders may be issued, and providing clear guidance concerning the conduct required by a dispersal order, the ordinance must also, in effect, ensure that a citizen has a sufficient factual basis to permit him or her to evaluate whether the order has been properly issued.

This latter requirement finds no support whatsoever in the cases of this Court. Indeed, any such requirement is foreclosed by *Boos* v. *Barry*, in which this Court addressed a statute that had been construed to permit police officers to issue dispersal orders within the vicinity of an embassy, but only where "'the police *reasonably believe* that a threat to the security or peace of the embassy is present.'" 485 U.S. at 330 (citation omitted) (emphasis added). It is apparent that, as the Illinois Supreme Court observed with respect to the Chicago ordinance, this "reasonable belief" standard of the *Boos* statute often will be satisfied based in whole or in part upon information known to the officer issuing the dispersal order but *not* known to the person to whom the order is issued. Thus, for example, the officer

may know that the embassy is presently hosting its head of state, who has been the subject of credible death threats; or that the embassy at that moment has a large number of guests inside; or that the rear fire door to the embassy is temporarily stuck shut; or that the ambassador is inside recovering from a recent operation. Even though the statute, as construed, obviously permitted police officers to rely upon such undisclosed factors in issuing dispersal orders outside embassies, this Court found it sufficient that the statute, in general language "of common understanding," provided objective standards to channel the discretion of individual officers. 485 U.S. at 332. Nothing in the Court's opinion suggests that, in addition to meeting these requirements, an enactment must also provide a basis by which a citizen may independently verify the propriety of a particular dispersal order.

Moreover, the novel notice requirement imposed by the Illinois Supreme Court in this case defies common sense and is hopelessly unworkable. Under the lower court's reasoning, a person could not be prosecuted for resisting arrest unless he or she was first apprised of the information that led the officer to order the person to submit to arrest. Just as the lower court was concerned that a dispersal order might be based on a mistaken belief, rooted in facts known only to the officer, that a group of loiterers contains a criminal street gang member, so too a police officer's decision to effect a warrantless arrest might in some cases be based upon a probable cause determination derived from information unknown to the arrestee. But it has never been thought that the Constitution forbids a State from requiring compliance with a police officer's order of arrest, even if it later turns out that the officer lacked probable cause. *See, e.g.*, *People* v. *Curtis*, 70 Cal. 2d 347, 352-53 (1969) (rejecting due process and Fourth Amendment challenges to California statute prohibiting forceful resistance to unlawful as well as lawful arrests).

In any event, it is simply untrue that, as Respondents

have asserted, "the ordinance here provides no guidance for avoiding a police order to disperse in the first place." Brief in Opp. for Morales Resps. 13. A citizen who desires to avoid receiving a dispersal order can generally do so by refraining from loitering with criminal street gang members in Chicago. That an officer might nonetheless issue a dispersal order based on a reasonable but erroneous belief that a group of loiterers contains a gang member does not render the ordinance vague. Indeed, if that were true, the *entirety* of the criminal law would be vague: the fact that a citizen might attempt to follow every law scrupulously does not eliminate the possibility that, in a particular set of circumstances, an officer might nonetheless reasonably but mistakenly conclude that probable cause to arrest exists.[8]

C. The Ordinance is Fully Consistent With this Court's "Substantive Due Process" Jurisprudence

The court below also invalidated the ordinance on the ground that it violates "substantive due process." Pet. App. 19a. In reaching this conclusion, the court first stated that the freedom to engage in "harmless activities" such as "loafing, loitering, and nightwalking" is "an aspect of the personal liberties protected by the due process clause." *Id.* at 17a-18a (citing *Papachristou*). The court held that, by requiring groups of loiterers containing probable gang members to comply with an order to move on, the ordinance implicates the "personal liberty interests" in freedom of movement and in associating with others. *Id.* at 18a. The lower court, however, did *not* characterize these "liberty

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[8] Respondents' assertion that the ordinance is somehow unique or infirm because it "elevate[s] an officer's reasonable suspicion or probable cause into an element of the offense," Brief in Opp. for Morales Resps. 14, is even more wide of the mark. Statutes that make it a crime to resist a lawful arrest often require, as an element of the offense, a showing that the arresting officer had probable cause to make a warrantless arrest. *See, e.g.*, California Jury Instructions, Criminal §16.104 (West 6th ed. 1996) (defining "lawful arrest" to include warrantless arrests made with "reasonable cause," and defining "reasonable cause").

interests" as being "fundamental rights" whose infringement would have to be justified under "strict scrutiny," *cf. Reno* v. *Flores*, 507 U.S. 292, 301-02 (1993); on the contrary, the court considered only whether the ordinance "intrude[d] upon [these] personal liberties arbitrarily or in an utterly unreasonable manner." Pet. App. 18a.

Applying this standard, the court held that the ordinance was "arbitrary" in two respects. First, the court held that it was arbitrary to apply the ordinance to persons whom the police had probable cause to believe were gang members but who were not *actually* gang members. *Id.* Second, the court found it arbitrary that the ordinance was "aimed at persons based merely on the suspicion that they may commit some future crime." *Id.* Both of these conclusions were erroneous.[9]

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[9] Because the court thus held that the ordinance was arbitrary, it declined to consider whether the ordinance infringed "fundamental rights." *Id.* at 19a. It is clear, however, that the ordinance does not do so. This Court has made clear that such rights include only "those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'" *Washington* v. *Glucksberg*, 117 S. Ct. 2258, 2268 (1997) (citations omitted). This Court has recognized as "fundamental" in this sense "certain basic matters of procreation, marriage, and family life,"*Kelley* v. *Johnson*, 425 U.S. 238, 244 (1976), but quite obviously none of those rights is implicated here. Moreover, although this Court long has recognized a right to travel from state to state and abroad, *see Kent* v. *Dulles*, 357 U.S. 116, 125-26 (1958); *Edwards* v. *California*, 314 U.S. 160, 178 (1941), and has at times referred more loosely to a "constitutional right to freedom of movement," *see Kolender*, 461 U.S. at 358; *Kent*, 357 U.S. at 126, it is clear that there is no generalized fundamental right to be free of restrictions upon one's physical movement. *See, e.g., Hutchins* v. *District of Columbia*, 1998 U.S. App. LEXIS 10303 at *80 (D.C. Cir. May 22, 1998) (Silberman, J., dissenting) ("[S]uch a broad assertion would lead to somewhat ridiculous results—for example, installing a traffic light would trigger strict scrutiny."). Nor does the ordinance implicate fundamental rights of association. *See City of Dallas* v. *Stanglin*, 490 U.S. 19, 24 (1989) (holding that the "right of association" as a "fundamental element of personal liberty" extends only to "certain intimate human relationships"). Finally, nothing in *Papachristou* creates a "fundamental right" to loiter on the streets under the circumstances addressed by the Chicago ordinance. Although Justice Douglas' colorful opinion in that case refers to the "amenities of life" as including loafing, wandering, and strolling, 405 U.S. at 164, nothing in the opinion suggests that government limitations on these "amenities" would be subject to "strict scrutiny."

Even assuming *arguendo* that the lower court was correct in concluding that the ordinance implicates liberty interests that comprise a "substantive component of the Due Process Clause" protected against "arbitrary" governmental action," judicial restraint still dictates that the interests so recognized be carefully defined. *Collins* v. *City of Harker Heights*, 503 U.S. 115, 125-26 (1992). Here, the proper description of the right asserted by respondents is at best a narrow one—the right to remain in a public place after having been asked to move on by an officer who reasonably believes that the group of loiterers asked to move on includes at least one member of a criminal street gang. For several reasons, the ordinance does not arbitrarily infringe the liberty interests asserted here, however defined.

First, the burden imposed by the ordinance is relatively modest. All that a citizen needs to do to comply with the ordinance is to move on when requested to do so. If the citizen desires to associate with criminal gang members, he may continue to do so simply by moving indoors, or by refraining from loitering.

Second, the ordinance clearly serves a valid and legitimate state interest. The City of Chicago reasonably concluded, based upon numerous studies of the matter, that gang loitering was intimidating to residents and contributed significantly to increased levels of violence. Although the court below found it distasteful that the City Council specifically targeted gang members on the supposition that "they may commit some future crime," Pet. App. 18a, there is simply no authority for the view that a local legislative body, in the exercise of its police powers, may not regulate behavior—such as gang loitering—that it finds to be *both*

harmful in its own right (because it intimidates neighborhood residents and reduces property values) *and* likely to lead to the commission of more serious crimes.

Third, the ordinance and General Order are anything but arbitrary in the manner in which they target the problem of gang activity in Chicago's neighborhoods. As noted above, the ordinance goes directly to the problem at hand—the congregation of groups of gang members and others loitering without apparent purpose. The lower court believed it was "arbitrary" not to limit the applicability of the ordinance to *actual* gang members (as opposed to those whom the police have probable cause to believe are gang members), Pet. App. 18a, but it cited no authority for this view. Moreover, as explained above, *supra* at 26-27, police officers are regularly required to make probable cause determinations with respect to a wide variety of matters, and the fact that such a system tolerates errors—someone may be lawfully arrested who is in fact innocent—does not render it arbitrary.

CONCLUSION

The judgment of the Supreme Court of Illinois should be reversed.

Dated: June 19, 1998 Respectfully submitted,

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BRIEF

(13)

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In the Supreme Court of the United States

OCTOBER TERM, 1997

CITY OF CHICAGO,

Petitioner,

v.

JESUS MORALES, ET AL.,

Respondents.

On Writ of Certiorari to the Supreme Court of Illinois

BRIEF *AMICUS CURIAE* OF THE CHICAGO NEIGHBORHOOD ORGANIZATIONS IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether Chicago's gang loitering ordinance, which enjoys the overwhelming support of citizens who share in the burdens as well as the benefits of the law, and which was adopted because it has a significantly less destructive impact on gang members and their communities than do alternative law-enforcement policies, strikes a reasonable and constitutional balance between liberty and order.

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INTRODUCTION AND INTEREST OF *AMICI CURIAE*[1]

Amici— collectively, "the Neighborhood Groups" — are 20 civic, religious, and other community associations from throughout Chicago.[2] Working closely with their elected representatives on the City Council, the Neighborhood Groups played a critical role in the design of the gang-loitering ordinance ("the Ordinance"). Because the Ordinance's implementing regulations oblige the police

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[1] The parties have consented to the filing of this brief. Copies of the consent letters have been lodged with the Clerk of the Court. This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than the *amici curiae*, their members, and their counsel made a monetary contribution to the preparation and submission of this brief.

[2] *Amici* include: United Neighborhood Organization, a nonprofit organization whose focus is economic development, school reform, and civic participation; Southwest Neighbors Against Gangs, a southwest side community organization whose efforts include aggressive graffiti removal and active Nite Patrol; West Woodlawn Council of Block Clubs, representing roughly 75 block clubs in Woodlawn; Hegewisch Community Committee, a 60-year-old organization working to prevent juvenile delinquency; Chicago Roseland Coalition for Community Control, an economic development corporation of 24 years in Roseland; South Chicago Chamber of Commerce, representing 275 area businesses, churches, and school and community groups; Ravenswood Community Council, dedicated to housing, youth, senior programs, and community safety; Nobel Neighbors, an organization committed to improving living conditions in West Humboldt Park; Hermosa Community Organization, an organization addressing escalating neighborhood crime and providing tuition support for area children; Reach Out & Touch Ministries, working to provide at-risk youth in Englewood with job opportunities; West Humboldt Park Family & Community Development Council, a community-based group committed to housing, economic development, and neighborhood safety; Bethel New Life, working to increase the quality of life in East & West Garfield Park through crime prevention and economic development; Crime Stoppers, an Englewood organization directed at controlling conditions that foster crime; Lawndale Business & Local Development Council, representing 66 local businesses working to create jobs on Chicago's west side; CARE, rehabilitating homes, removing graffiti, and promoting neighborhood safety; Near Westside Community Development Corporation, a "bottom up" planning movement aimed at neighborhood development and self-sufficiency; Edgewater Community Council, which focuses on housing and public safety issues; Emmaus Ministries, an outreach to young men involved in high-risk street activity including gangs, prostitution, and substance abuse; Walls Community Church, a west side church committed to urban life and the poor; Circle Urban Ministries, which operates youth development and shelter programs in the Austin community.

to consult with community associations, the Neighborhood Groups have also been intimately involved in determining where and how the Ordinance is enforced. Finally, the Neighborhood Groups have played an active role defending the Ordinance, filing *amicus* briefs in the Illinois Court of Appeals, the Illinois Supreme Court, and in support of the petition for certiorari.

The interest of the Neighborhood Groups can be simply stated: to be heard. No other group of citizens is in a better position to address the practical impact of the Ordinance. The Groups' members are the ones who daily face a heightened risk of criminal victimization from gang criminality, and who experience first-hand the destructive impact of gangs — and more severe means of abating gangs — on the lives of their communities. The Groups are the mothers and fathers, the sisters and brothers, and the neighbors and friends of the youths subject to the law. They support the Ordinance because it is a form of policing that secures order *without* destroying the lives of community youth who find themselves enmeshed in the complex social and economic forces that fuel gang criminality.

From the outset, those who have opposed the Ordinance have dismissed the unique perspective of the Neighborhood Groups' members as irrelevant. An exchange from the City Council hearings on the Ordinance typifies the critics' attitude. At the hearings, dozens of residents — from church leaders, to representatives of local neighborhood associations, to ordinary citizens — testified in favor of the proposed law. Harvey Grossman, Director of the Illinois ACLU, testified against it:

> I am a lawyer, and I spend a great deal of time doing nothing more than reviewing ordinances and statutes, and it turns into a little bit of a long exam game. * * * We pick apart the statute. We focus on [a] word or [a] phrase, and we try to say why that phrase might or might not be constitutional.

Supp. R. II at 107. Alderman William Beavers, a Council member who represents a ward on Chicago's south side, objected to this bookish conception of how to appraise the constitutionality of the law. "I don't know if you are attuned to what's going [on] in these neighborhoods," he told Grossman. "Maybe I need to take you out there and show you what's really going on." *Id.* at 119. To which Grossman replied that that would not be necessary:

> I think our ability to come together and to try to resolve issues [like this] really doesn't * * * depend on if I see what's happening in your neighborhood or you see what's happening in my neighborhood.

Id. at 120. Rather, what it does depend on, he stated (*ibid.*), is

> empathy or ability to understand what's happening to other people and, two, some commitment, some intellectual integrity and some commitment to principle. And the principle that I am suggesting to you is inviolate. It doesn't change.

The Neighborhood Groups submit that this conception of how to assess the constitutionality of the Ordinance is just plain wrong. We do not deny that the Ordinance poses challenging issues. But we do deny, emphatically, that those issues — bearing as they do on the proper balance of liberty and order in *our* communities — can adequately be considered from the perspective of someone who does "nothing more" than "pick apart" statutes and ordinances for a living. We vehemently contest the suggestion that these issues can fairly be resolved by a formulaic application of "inviolate" "intellectual" "principle[s]" that "do[]n't depend," "really," on "see[ing] what's happening in [our] neighborhood[s]." And most important of all, we indignantly resist the characterization of the complex issues in this case as one big "exam game." *Ibid.*

The fate of the Ordinance is *not* a "game" for members of the Neighborhood Groups. The goal of this brief is to show that their perspective *is* constitutionally relevant and to explain why, in their

view, the Ordinance strikes a constitutionally permissible balance between liberty and order.

SUMMARY OF ARGUMENT

I. Courts should adjust the level of constitutional scrutiny applied to a policing technique based on the breadth of its impact on liberty within the community. The proposition that courts should reserve the highest degree of scrutiny for laws that concentrate burdens on politically disempowered minorities figures prominently across a wide expanse of doctrines. The exacting scrutiny associated with this Court's Due Process vagueness jurisprudence reflects the assumption that communities never share in the burden on liberty associated with public order laws, the incidence of which is predictably concentrated on minority citizens.

That perception accurately captured the political reality of the 1960s and early 1970s, when this Court's leading criminal procedure precedents were established. Today, however, minority citizens are no longer so disenfranchised, and in fact exercise significant authority in the Nation's inner-cities. They are *using* their new-found political power to secure effective law enforcement in the form of anti-loitering laws, curfews, and order-maintenance policing.

It makes little sense to approach the constitutional questions posed by these laws as if they were the same ones posed by an earlier generation of public order provisions, the purpose and effect of which were to oppress minorities. Rather than subject all such laws to searching scrutiny, courts should consider whether the community at large is meaningfully sharing in the burden created by the challenged provision. If it is, courts should afford significant weight to the judgment of the community's political representatives that the subject law reasonably balances liberty and order.

II. The Ordinance affects members of the community at large in a meaningful way. Unlike the anti-loitering laws of an earlier

generation, the Ordinance is *not* a tool of repression being used by white majorities to reinforce the exclusion of minorities from the community's political and economic life. To the contrary, representatives of Chicago's poorest minority communities have played a key role in the adoption and implementation of this law. The residents of those communities, moreover, are linked by strong social and familial ties to the gang members against whom the Ordinance is enforced. It is precisely because they care so deeply about the welfare of these persons that residents favor the relatively mild gang-loitering law as an alternative to draconian penalty enhancements for gang crimes, severe mandatory minimum prison sentences for drug distribution, and similarly punitive measures. The pervasive sense of "linked fate" between the majority of these communities' residents and the youths affected by the Ordinance provides a compelling reason to respect the community's determination that such measures enhance rather than detract from liberty in their communities.

III. Evaluated under an appropriately deferential standard of review, the Ordinance strikes a reasonable balance between liberty and order. Like other forms of order-maintenance policing, the Ordinance promotes obedience to law primarily through its positive effect on community social norms. Suppressing visible displays of gang authority counteracts the social pressures that drive many youths to join or emulate gang members. It also provides assurance to committed law-abiders, who are more likely to cooperate with each other and with the police when insulated from relentless public intimidation by gang members. At the same time, the guidelines established by the Ordinance's implementing regulations, combined with the ongoing role of community organizations in overseeing its implementation, furnish potent safeguards against abusive enforcement. Indeed, the Ordinance represents a significantly *less coercive* alternative to conventional law-enforcement strategies for combating gangs, and even to other forms of order-maintenance policing, which afford police officers considerably more discretion in enforcement.

ARGUMENT

I. THE GENERALIZED IMPACT OF A POLICING TECHNIQUE ON MEMBERS OF THE COMMUNITY IS RELEVANT TO THE LEVEL OF JUDICIAL SCRUTINY

Applying this Court's decisions in *Papachristou* v. *City of Jacksonville*, 405 U.S. 156 (1972), and *Shuttlesworth* v. *City of Birmingham*, 382 U.S. 87 (1965), the Illinois Supreme Court held that the Ordinance was unconstitutionally vague. We submit that the court fundamentally misconceived the rationale, and hence the proper reach, of those decisions. The exacting demand for statutory precision reflected in those cases is reserved for discretionary policing techniques the coercive incidence of which is concentrated on a politically disempowered minority. When the policing technique affects the community generally, in contrast, courts appropriately relax the degree of scrutiny in recognition of the community's own incentives to police its police.[3]

This Court commonly describes constitutional rights — particularly those that relate to criminal justice — as guaranteeing a reasonable "balance * * * between liberty and order." *E.g.*, *Medina* v. *California*, 505 U.S. 437, 443 (1992). In determining whether the balance struck by any particular policy is reasonable, courts appropriately pay attention to how diffusely the impact of that policy is felt within the community. Where the coercive incidence of a particular policy is being visited on a powerless minority, popularly elected representatives lack adequate incentives to determine whether the order benefits of the law for the community at large truly outweigh the liberty costs to the few. See generally *United States* v. *Carolene Products Co.*, 304 U.S.

[3] The court below also held that the Ordinance violated substantive due process. We dispute that ruling on the same ground — namely, that in undertaking to enforce its own conception of liberty, the court applied a degree of scrutiny inconsistent with the deference that is due when the law in question does not concentrate burdens on a disempowered minority but rather affects members of the community generally.

144, 152 n.4 (1938); J. Ely, *Democracy and Distrust* 73-104 (1980). This explains why courts strictly scrutinize policies that discriminate on the basis of race, restrict "dangerous" speech, or impose special obligations on account of religion. See M. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 Va. L. Rev. 747, 748-57, 760-63 (1991).

But when a community can be seen as *internalizing* the coercive incidence of a particular policy, courts are much less likely to second-guess political institutions on whether the tradeoff between liberty and order is appropriate. Thus, the Free Exercise Clause proscribes "'prohibition[s] that society is prepared to impose upon [religious minorities] but not upon itself'" (*Church of Lukumi Babalu Aye* v. *City of Hialeah*, 508 U.S. 520, 545 (1993)), but does not affect "neutral law[s] of general applicability" resulting from the normal "political process" in our "democratic government" (*Employment Division* v. *Smith*, 494 U.S. 872, 879, 890 (1990)). Likewise, this Court has readily sustained free speech challenges to taxes that "single[] out the press," reasoning that "the political constraints that prevent a legislature from passing crippling taxes of general applicability are weakened" in such circumstances, while rejecting free speech challenges to taxes of general applicability, reasoning that there is little cause to "fear that a government will destroy a selected group of taxpayers by burdensome taxation if it must impose the same burden on the rest of its constituency." See *Minneapolis Star & Tribune Co.* v. *Minnesota Comm'r of Revenue*, 460 U.S. 575, 585 (1983) (invalidating a tax targeted at the press); *cf. Leathers* v. *Medlock*, 499 U.S. 439, 447 (1991) (sustaining a generally applicable sales tax as applied to the press).

These principles apply broadly in constitutional law. For instance, in challenges to state laws pursuant to the Dormant Commerce Clause, the Court carefully scrutinizes laws whose "burden falls principally upon those without the state," simply because such laws are "not likely to be subjected to those political

restraints which are normally exerted on legislation where it affects adversely some interests within the state." *South Carolina State Hwy. Dep't* v. *Barnwell Bros.*, 303 U.S. 177, 184 n.2 (1938). Similarly, the Takings Clause principally "bar[s] Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole" (*Armstrong* v. *United States*, 364 U.S. 40, 49 (1960)), but does not limit land-use regulations that impose equal burdens on all property owners (see *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470, 486 (1987)). Even the Court's standing cases reflect the notion that the generality of a burden is important in determining what role (if any) the judiciary should play in its redress. As the Court explained just a few days ago in *Federal Election Commission* v. *Akins*, 118 S. Ct. 1777, 1785 (1998), "where large numbers of Americans suffer alike, the political process, rather than the judicial process, may provide the more appropriate remedy for a widely shared grievance."

The constitutional doctrines that regulate policing reflect the same emphasis on how burdens are apportioned. Normally, the police must obtain a warrant, supported by probable cause, before they can conduct a search. See, *e.g.*, *Coolidge* v. *New Hampshire*, 403 U.S. 443, 449-50 (1971). This requirement recognizes that law-enforcement officials are not likely to attach sufficient value to the liberty of individual criminal suspects, whose interests are generally a matter of indifference to the general public. See *ibid.*; *cf.* Ely, *supra*, at 96-97. Law-enforcement officials need not obtain a warrant or even have probable cause, however, to stop motorists at sobriety checkpoints (see *Michigan Dep't of State Police* v. *Sitz*, 496 U.S. 444 (1980)), or to search all persons entering airports or government buildings (see *National Treasury Employees Union* v. *Von Raab*, 489 U.S. 656, 675 n.3 (1989)). Insofar as these policies burden average members of the community, there is far less reason for courts to doubt the determination of politically accountable officials that these policies strike a fair balance between liberty and order. See S. Wasserstrom

& L. Seidman, *The Fourth Amendment As Constitutional Theory*, 77 Geo. L.J. 19, 95-96 (1988).

If the burden of a law-enforcement policy falls on someone other than the average citizen, deference is still due so long as the political process can be viewed as sufficiently attentive to that party's interests. Thus, random drug-testing of student athletes is exempted from the warrant requirement not because *student athletes* exercise significant influence in the political process but because their *parents*, who naturally take their children's interests to heart, do. See *Vernonia Sch. Dist.* v. *Acton*, 515 U.S. 646 (1995). Likewise, searches of regulated commercial enterprises, which exert considerable influence in the political process, and which pass the cost of regulation onto consumers, are exempt from the warrant requirement under the "administrative search" doctrine. See, *e.g.*, *New York* v. *Burger*, 482 U.S. 691 (1987); W. Stuntz, *Privacy's Problem and the Law of Criminal Procedure*, 93 Mich. L. Rev. 1016, 1044-45 (1995).

There is no reason to approach the Due Process constraints on policing any differently. The "void for vagueness" doctrine permits "reasonable breadth" in statutory drafting in order to accommodate the need for "flexibility" in law enforcement and the interest of citizens in avoiding "arbitrary and discriminatory application." *Grayned* v. *City of Rockford*, 408 U.S. 104, 109-10 (1972); see *Boyce Motor Lines* v. *United States*, 342 U.S. 337, 340 (1952) (Constitution demands only "a reasonable degree of certainty" in light of "untold and unforeseen variations in factual situations"). Just how precise the language of a statute must be to be "reasonable" should depend on how widely the burden of that law is likely to be felt within the community.

Papachristou and *Shuttlesworth* reflect the exacting degree of precision that courts appropriately demand when the burdens of community policing are being concentrated on politically disadvantaged minorities. Well into the 1960s, discretionary law enforcement authority was a central means by which communities

in both the North and South excluded minorities from economic and political life.[4] *Shuttlesworth* and *Papachristou* both arose from this factual context, as did a variety of other landmark criminal procedure precedents.[5] Because those arrested under the public order laws of the era typically came "from minority groups" with insufficient political clout "to protect themselves" and without "the prestige to prevent an easy laying-on of hands by the police," it would have been absurd, the author of *Papachristou* observed, for courts to defer to the judgment of the community's political institutions on whether those forms of policing embodied a reasonable balance of liberty and order. W. Douglas, *Vagrancy and Arrest on Suspicion*, 70 Yale L.J. 1, 13 (1960).

It would be a mistake, however, to assume that the conditions that informed *Papachristou* and *Shuttlesworth* are immutable. For one thing, as a result of the Voting Rights Act of 1965, 42 U.S.C. § 1971 *et seq.*, African-Americans are no longer so disenfranchised, and in fact exercise considerable political influence, particularly in the Nation's inner-cities.[6] Nor is the relationship

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[4] See R. Kennedy, *Race, Crime, and the Law* ch. 3 (1997); C. Steiker, *Second Thoughts About First Principles*, 107 Harv. L. Rev. 820, 839-40 (1994); D. Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 Colum. L. Rev. 551, 595-601 (1997).

[5] At issue in *Shuttlesworth* was the application of a loitering ordinance to a "'notorious' • • • civil rights" activist at a time when African-Americans were engaged in picketing and boycotting of businesses that discriminated on the basis of race. See 382 U.S. at 101-02 (Fortas, J., concurring). *Papachristou* involved the application of such a law to two interracial couples sitting in a parked car. See 405 U.S. at 158-59. See also *Cox v. Louisiana*, 379 U.S. 536 (1965) (invalidating conviction obtained under vaguely worded statute as applied to protesting civil rights demonstrators); *Bouie v. South Carolina*, 378 U.S. 347 (1964) (same). See generally K. Pye, *The Warren Court and Criminal Procedure*, 67 Mich. L. Rev. 249, 256 (1968), and Steiker, *supra*, at 844.

[6] On the dramatic effects of the Act on minority registration, turnout, and representation, see *Quiet Revolution in the South: The Impact of the Voting Rights Act, 1965-1990* (C. Davidson et al. eds., 1994). On the increase of African-
(continued...)

between minorities and police marked by the unbridled animosity that furnished the backdrop for *Papachristou* and *Shuttlesworth*. Due in large part to the increased political representation of minorities, African-Americans today make up a significant percentage of all urban police departments.[7] New York, Washington, D.C., and Los Angeles, for example, have all had black police chiefs accountable to black mayors.

Indeed, rather than shunning the police, African-Americans are now using their political strength to remedy the historic *under-enforcement* of law in their communities. In nearly every large American city, African-Americans have supplied the impetus for the revival of community policing. African-American community groups (including the Urban League) were the driving force behind the adoption of curfews in cities such as Miami, Dallas, San Diego, and Washington, D.C.[8] African-American city council

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[6](...continued)
American representation in elected offices at all levels of government, see Joint Ctr. for Political & Economic Studies, *Black Elected Officials: A National Roster* (1993); Joint Ctr. for Political Studies, *Black Elected Officials: A National Roster* (1984); see also S. Lawson, *Running for Freedom: Civil Rights and Black Politics in America Since 1941*, at 170-182 (1991) (detailing progress of Black urban politicians and noting triumphs of candidates in Newark, Oakland, New Orleans, Atlanta, Detroit, and Gary among other cities).

[7] Consider the "index of black representation," which is calculated by dividing the percent of African-American police officers in a department by the percent of African Americans in the local population of several major cities. Los Angeles's index increased from .55 to 1.00 between 1983 and 1992. Detroit's index increased from .49 to .70 during the same period. Chicago, San Diego, Dallas, and Phoenix posted indexes of .64, .80, .64, .77 in 1992, respectively, each an increase from 1982 levels. See Sourcebook of Criminal Justice Statistics Table 1.36 at 49 (K. Maguire et al. eds. 1994).

[8] See *All Things Considered: Miami Curfew Gaining Support Among Many Black Groups* (National Public Radio broadcast, Feb. 24, 1994) (reporting that curfew ordinance sponsored by African-American County commissioner is supported by 70% of African-Americans in Dade County and by Greater Miami Urban League); *The Teen Curfew Works* (editorial), San Diego Union-Tribune, Aug. 7,
(continued...)

members, representing the city's most crime-ridden districts, were instrumental in the enactment of the Chicago's Ordinance. See pp. 14-16, *infra*. African-Americans have also strongly supported the use of anti-loitering laws in other cities, as well as the renewed attention to order-maintenance policing in New York.[9]

The relationship between the political supporters of these laws and those at whom those laws are aimed also distinguishes the new community policing from the old. Unlike the 1960s, today there is no natural antagonism between the supporters of community policing and those who bear the coercive incidence of curfews, anti-loitering laws, and the like. On the contrary, these two groups are intimately linked by strong emotional, social, and even familial ties. In fact, many inner-city residents support anti-loitering laws and curfews precisely because they see them as tolerably *moderate* alternatives to the draconian punishment of minor drug offenses.[10]

The idea that the resurgence of public order laws signals a return to the discriminatory and arbitrary policing that motivated *Papachristou* completely misconceives the political reality. These

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[8](...continued)
1994, at G2 (minority community support for San Diego curfew); B. Clements, *Views Differ on Dallas' Curfew, Which Spawned Tacoma's Plan*, News Trib. (Tacoma, Wash.), Oct. 17, 1994, at B1 (same, Dallas curfew); T. Locy, *D.C. Curfew Overturned in Federal Court*, Wash. Post, Oct. 30, 1996, at A1 (Washington, D.C. curfew sponsored by African-American council member and supported by African-American Mayor).

[9] See Livingston, *supra*, at 623 ("Loitering legislation in the 1990s has often had broad community support, particularly in some predominantly minority communities plagued by street-level drug dealing."); B. Harden, *Letter from New York: "Ideal State of Cleanliness" Is Apple of Giuliani's Eye*, Wash. Post, Mar. 23, 1998, at A6 (reporting majority of city's African-Americans support Mayor Giuliani based on perception that his emphasis on "civility" is responsible for steep drops in crime in poor, minority neighborhoods).

[10] See T. Meares, *It's a Question of Connections*, 31 Val. U. L. Rev. 579, 588-89 (1997); T. Meares, *Social Organization and Drug Law Enforcement*, 35 Am. Crim. L. Rev. 191, 211-17 (1998).

new public order laws "are not facially aimed at rendering some people, like racial minorities, transients, and the poor, outsiders to the community." Livingston, *supra*, at 594. Rather, they are part and parcel of minority communities' efforts to restore community organization. Meares, *Social Organization*, *supra*, at 224-26.[11]

Because the circumstances surrounding the adoption and enforcement of public order laws can vary, constitutional doctrine should not presume that all such laws are of a piece. The most straightforward way for the Due Process vagueness doctrine to take account of the relevant differences in such laws is through the burden-internalization principle that informs constitutional jurisprudence in so many other settings. Thus, rather than subject all public order laws to the searching scrutiny embodied in *Papachristou* and *Shuttlesworth*, courts should first ask whether the community itself is sharing in the burden that that law imposes on individual freedom. Relevant indications are the purposes served by the law (see *Church of the Lukumi Babalu Aye*, 508 U.S. at 545-46), the relationship between supporters of the law and those to whom it is being applied (see *Vernonia School Dist.*, 515 U.S. at 649-50, 665), and the availability of administrative procedures aimed at guaranteeing effective political oversight of the exercise of discretion (see Livingston, *supra*, at 653-58). If, on this basis, a court concludes that a law's impact on liberty is being widely felt

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[11] Not surprisingly, when civil libertarians challenge curfews, anti-loitering laws, and like forms of order-maintenance policing as inviting racial harassment, their lawsuits are frequently *opposed* by minority citizens themselves. See, *e.g.*, Clements, *supra*, at B1 (quoting African-American mother who spear-headed support for Dallas curfew: claim that curfew would lead to racial harassment "was an ACLU scare tactic that polarized the community"); R. Conner et al., *Listen to the Voice of the Projects* (letter to the Editor), N.Y. Times, Apr. 15, 1994, at A30 (noting that residents of Chicago housing projects sought legal representation to oppose ACLU class action brought on residents' behalf); Sen. U. Curie, *The ACLU Pits the Civil Rights of Few Against the Common Good* (Letter to Editor), Wash. Times, Nov. 30, 1996, at A12 (comment of African-American legislator on ACLU opposition to curfews: "the ACLU seem[s] to be marching to music only it c[an] hear").

within the community, it should afford that law greater deference, in recognition of the community's own considered judgment that it appropriately balances liberty and order.

II. THE BURDENS ON LIBERTY ASSOCIATED WITH THE ORDINANCE AFFECT MEMBERS OF THE COMMUNITY GENERALLY

This Court's jurisprudence reserves the strictest scrutiny for police practices that concentrate burdens on individuals who are excluded from the political process and whose interests are not otherwise adequately represented by members of the community at large. That situation does *not* describe the Ordinance. Rather, the day-to-day impact of the Ordinance has been felt generally by the citizens of affected neighborhoods, who are intimately connected to the city's gang members, and who support the law because it is the *least coercive* means of protecting themselves, their children, and their neighbors from the scourge of gang criminality.

Unlike the public order provisions scrutinized by this Court in the 1960s, the Ordinance was not imposed on minorities by an alien political establishment; rather, it was enacted at the behest of those very citizens. Members of the Neighborhood Groups, as well as many other grassroots organizations from the poorest and most crime-ridden minority neighborhoods in the city, played a critical role in the Ordinance's adoption and implementation.[12] The Chicago City Council held two days of hearings on the Ordinance, replete with testimony of residents and community leaders registering support for its adoption. As numerous residents explained, when "[a] gang claims the neighborhood as its own," "[t]hey know where you live," "what time you leave, what time

[12] For example, the transcripts of the meeting of Chicago City Council Committee on Police and Fire on May 15, 1992, and May 18, 1992, demonstrate that there was widespread support for the Ordinance from neighborhood groups on Chicago's predominantly minority 7th, 8th, and 20th wards on the south side of the city.

you come home." Supp. R. I at 54, 66, 67. "You can't get on the bus * * * [or] go to church on Sundays," because "[w]hen you go to the bus stop, there is a group of people" waiting. *Id.* at 108. Residents of Chicago's poorer neighborhoods — those located in proximity to the expressways — also described the loitering of gang members and associates as designed to facilitate drug sales: individuals loiter on corners to advertise the wares of associates hidden in dark alleys and to warn their compatriots of the arrival of police. *Ibid.* As gang control solidifies, "people begin to hide behind locked doors, [and] the gang is free again to turn the community into open air drugstores and eventually a war zone." *Id.* at 54. Not surprisingly, when the proposed Ordinance was put to a vote, Aldermen representing the city's poorest, predominantly minority wards—*e.g.*, Alderman Ed Smith, representing Chicago's highest-crime police district—supplied the key support for its passage.

These communities continued to support the Ordinance after enactment. In fact, the City Council recently adopted a resolution supporting the invalidated Ordinance by a 3-to-1 margin. *Journal, City Council, Chicago,* May 20, 1998, at 70134, 70135. Significantly, representatives of predominantly African-American and Latino wards — especially those in which gang-related crime poses serious challenges to the daily lives of residents — voted in favor.[13] In addition, the residents of these same wards have been actively organizing a petition drive in support of the Ordinance. To date, over 8,500 signatures have been collected throughout the City. *1998 Chicago Community Policing Convention Resolution Endorsing Chicago's Anti-Gang Loitering Ordinance*, on file with Office of City Clerk. Over *half* of these have been collected in the predominantly Latino communities of Pilsen, Little Village, Back

[13] Alderman representing the predominantly African-American 2d, 7th, 8th, 17th, 20th, 21st, 27th, and 29th wards all voted in favor of the resolution. Similarly, Alderman Frias, Olivo, Solis, Suarez, and Colom, all of whom represent heavily Latino-influenced wards, voted in favor. *Journal, City Council, Chicago, supra.*

of the Yards, Marquette Park, and Gage Park, all wards with vexing crime problems. *Ibid.*

In short, any suggestion that the Ordinance was adopted as a cover for harassing minority youths is completely misguided. Indeed, Aldermen from high-income and exclusive areas *could not* have sought to have it applied in this way, since enforcement is expressly confined to neighborhoods suffering from a pronounced gang presence. Moreover, the City volunteered not to enforce the Ordinance in those wards in which the Alderman did not support it. See F. Spielman, *Anti-Gang Law Won't Be Abused, City Says*, Chi. Sun-Times, June 19, 1992, at 10.

Nor can it be credibly maintained that those citizens who supported the Ordinance did so to oppress minorities within their own neighborhoods. Although not every person in those communities faced a significant risk of being approached by the police under the Ordinance, even those who were never asked to "move along" felt its impact in a meaningful way. After all, those who were subject to the Ordinance were not "outsiders"; they were the sons and daughters, the brothers and sisters, and the friends and neighbors of the community's own residents. Indeed, residents who supported the Ordinance did so precisely because they saw it as an acceptably moderate way to steer their children and their neighbors' children away from the gang life.

The spirit that marked community support for the Ordinance reflects two larger currents of sentiment in inner-city communities. The first is an extended sense of empathy. Individuals in these communities tend to evaluate whether a policy benefits them individually by considering its impact not just on *themselves* but also on members of the groups to which they belong. University of Chicago political scientist Michael Dawson has referred to this decisionmaking process as "linked fate." M. Dawson, *Behind the Mule: Race and Class in African-American Politics* 75-84 (1994). Dawson has demonstrated through extensive use of public opinion

surveys that linked fate is especially prominent among African-Americans.

It was, in fact, this sense of solidarity with — and *not* any antagonism toward — the community's youth that motivated the grass-roots support for the Ordinance. Testifying at the City Council hearings, for example, Acasi Abey, President of the Brothers West Association, objected to law enforcement strategies that treat gang members as outsiders:

> [I]t's a community problem. I think a lot of times we approach a gang problem as if these kids were from outerspace. They are next door neighbors. Some of them go to church. Some of them are in school. Some of them are in college.

Supp. R. I at 143. Mr. Neil Bosanko, head of *amicus* South Chicago Chamber of Commerce (an organization comprising 275 businesses, churches, and school and community groups), is a *parent* of a youth imprisoned for his involvement in a gang-style murder. He supported the Ordinance as a morally responsible way to steer community youth away from gang life and to counter the escalating number of young murder victims from his neighborhood and young lives wasted in prison.

The second common sensibility that motivated the grass-roots support for the Ordinance was resentment of "get tough" law enforcement strategies. These approaches, which feature severe prison sentences for drug-dealing and related "street" crimes, can in fact *undermine* inner-city communities' own capacity to resist crime. Empirical work in criminology (undertaken, significantly, in Chicago) demonstrates that institutions of community life such as friendship networks, shared adult supervision of teens, and informal associations are critical to a neighborhood's ability to control offenders. See R. Sampson, *Neighborhoods and Violent Crime: A Multilevel Study of Collective Efficacy*, 277 Science 918 (1997); R. Sampson et al., *Community Structure and Crime: Testing Social-Disorganization Theory*, 94 Am. J. Soc. 774 (1989). Widespread imprisonment in high crime neighborhoods breaks up

families, disrupts local employment markets, and generally enfeebles the community institutions that prevent crime. See T. Meares, *Social Organization*, *supra*, at 205-11. The "get tough" style of law enforcement is generally resented by minorities for precisely that reason. In sum, the residents of poor, minority communities favor "middle ground" solutions to crime — ones that furnish a reasonable prospect of relief from crime without severely disrupting their communities. See T. Meares, *Charting Race and Class Differences in Attitudes Toward Drug Legalization and Law Enforcement: Lessons for Federal Criminal* Law, 1 Buff. Crim. L. Rev. 137, 144-47 (1997) (documenting that African-Americans are more likely to support drug criminalization, but to oppose severe penalties for offenders, than are similarly situated whites).

Testimony at the hearings shows community residents' awareness of the high costs that both gang criminality and severe prison terms visit on poor, minority communities. Imprisonment of youths such as Mr. Bosanko's son destroys lives just as surely as does gang violence. The goal of the Ordinance, as one resident put it, was not "to hurt anyone," but only to give the police the power "to clean these corners up." Supp. R. I at 67. Given the unusual sensitivity of the residents of these neighborhoods to the individual and societal costs of invasive policing, their considered judgment that the Ordinance embodies a reasonable accommodation of liberty and order is entitled to substantial deference.

III. THE ORDINANCE REASONABLY BALANCES LIBERTY AND ORDER

Because the coercive incidence of the Ordinance is felt by members of the affected communities generally, this Court should afford considerable deference to the judgment of the residents' political representatives that the Ordinance embodies a reasonable balance between liberty and order. See Part I, *supra*. Under this standard, the Ordinance passes muster under both procedural and substantive Due Process. The Ordinance is designed to protect the *whole* community — not just law-abiding citizens, but prospective

and current gang members as well — from the destructive impact of gang criminality. It does so, moreover, not by severely punishing gang members, who are also in significant ways *victims* of social conditions that they did not create. Rather, through a guided regime of discretion, subject to ongoing political monitoring, the Ordinance attacks the pathological social norms that fuel gang criminality and destroy the lives of gang members and non-gang members alike.

A. The Ordinance Substantially Promotes Order

1. *Gang criminality plagues inner-city neighborhoods.* Gang criminality has made the inner-city neighborhoods of Chicago deadly places to live. Stories of innocent bystanders shot in gang-war crossfire have become staples of newspaper headlines and TV news in Chicago as elsewhere. *E.g.*, D. DeFotis, *Police Fret for Public after Gang Shootings*, Chi. Trib., June 2, 1998, at B1; S. Power, *Boy Headed to School Killed by Gang Member, Police Say*, Dallas Morning News, Jan. 29, 1998, at 21A.

Although criminal gangs have long been part of the urban landscape, they have taken a dramatic new direction in recent years, away from small-scale and localized activities to highly organized takeovers of entire neighborhoods based on the acquisition of lethal weaponry financed by lucrative trading in crack cocaine. See H. Covey, et al., *Juvenile Gangs* 101 (1992); S. Mills & D. Bunuel, *Small Gang's Big Grip Troubles Neighborhood — The Saints Have Grown More Violent And More Diverse Since Forming In The 1960s*, Chi. Trib., Feb. 11, 1998, at B1. Brass knuckles and baseball bats are no longer the weapons of choice. See *There Are No Children Here*, Economist, Dec. 17, 1994, at 21 ("Now automatic and semi-automatic assault weapons are *de rigueur*"). Chicago and Los Angeles alone account for 1,000 gang homicides annually. OJJDP Fact Sheet, *supra*.

Street-level intimidation is one of the primary strategies by which gangs extend their influence. By stationing small groups of

gang members on the streets, gangs stake out and lay claim to turf, sell drugs to finance the procurement of arms, recruit new members (often coercively), serve as lookouts and intelligence gatherers, and intimidate neighborhood residents and passers-by. Intimidation takes many forms, including wearing gang colors and clothing, flashing gang signs, and plastering buildings with graffiti. See M. Genelin, *Gang Prosecutions: The Hardest Game in Town*, in *The Gang Intervention Handbook* 417 (1993). Street-corner squads of gang members also facilitate the commission of violent gang crimes. See M. Klein, *The American Street Gang* (1995); *Man Demanding Gang Affiliation Shoots Teen Standing on Street*, Chi. Trib., Feb. 17, 1998, at B3.

Law-abiding citizens are effectively imprisoned in their homes as a result of the mere presence of gang members on the streets. At the City Council hearings prior to passage of the Ordinance, residents vividly described their fear to walk their own streets in the face of loitering gang members for whom drugs, shootings, and vandalism constitute business as usual. See Supp. R. I at 53, 62, 93, 95, 110, 132, 138. Civil rights leader Jesse Jackson expressed the feelings of many when he stated, "Just to think we can't walk down our own streets, how humiliating." M. Johnson, *Crime: New Frontier*, Chi. Sun-Times, Nov. 29, 1993, at 4.

Children are particularly vulnerable to the intimidation of gang members congregating on the streets. Fear is the primary tool of gang recruitment. "[I]f you're [a child and] not in a gang," a Chicago anti-drug counselor told the Economist, "you're a target wherever you go." *There Are No Children Here, supra*. In Chicago, the heavy gang presence on the streets around the Robert Taylor housing project has resulted in "waves of fear-induced absenteeism" from neighborhood schools, prompting hundreds of volunteers to band together to shepherd children to school and the School Board to hire dozens of parents to serve as escorts. S. Braun, *Shepherds for a Flock in the Cross-Fire*, L.A.

Times, Jan 16, 1998, at A1; M. Martinez, *Parents Paid to Walk Line Between Gangs and School*, Chi. Trib., Jan. 21, 1998, at A1.

Gangs have focused their recruitment on increasingly younger children as the competition to control turf and drug markets has intensified. See P. Thomas, *Putting Children on the Front Lines*, Wash. Post, June 20, 1996, at A1; S. Mills & D. Bunuel, *Not Yet 13 — and a Murder Suspect*, Chi. Trib., Feb. 4, 1998, at A1; *There Are No Children Here, supra* (citing Chicago anti-gang counselor's estimate that 80% of boys aged 13 to 15 in the area where he works are involved in gangs). Moreover, whether or not they are gang members, children growing up in gang-dominated neighborhoods often show signs of post-traumatic stress disorder. A. Gonzalez et al., *Introduction to Gang Violence Prevention* 5-6 (1990). A study of children in Chicago day care centers found that 100% of them had seen a shooting by the age of five. P. Bennett, *Growing Up, Skewed, with Violence*, Bost. Globe, June 4, 1992, at 1. As one journalist reported several years ago, "many of the children emerge from the streets of Los Angeles more psychologically scarred than the young mujahedin who patrol the mountain passes of Afghanistan." A. Stanley, *Child Warriors*, Time, June 18, 1990, at 30.

Inner-city residents in Chicago and elsewhere are, in a very real sense, engaged in a battle to protect themselves from a deadly urban disease that victimizes both gang members and non-gang members. Their formidable challenge is to find a cure that does not itself threaten the well-being of their communities and children.

2. *The Ordinance is geared to reducing gang activity through its effect on social norms.* The disease of gang criminality has proven notoriously resistant to treatment. The conventional prescription is the "crack down" strategy of severe prison terms, which has done little to reduce gangs (see, *e.g.*, W. Miller, *Why the United States Has Failed to Solve Its Youth Gang Problem*, in *Gangs in America* 263, 267 (C. R. Huff ed., 1990)),

while leaving a trail of broken lives and fractured communities in its wake (see Meares, *Social Organization*, *supra*, at 206-07).

The Ordinance employs a unique approach to combating gangs based on a distinctive theory of why they exist. Rather than trying to bludgeon gang members into submission through severe punishments, the Ordinance seeks to reform the *social norms* that drive individuals into crime and weaken the community's own crime-defense mechanisms.

The causes of gang criminality are subtle. Residents of gang-ridden neighborhoods are not invariably poorer than the residents of relatively gang-free ones. See Miller, *supra*, at 280-81. Nor is law-enforcement in gang-ridden neighborhoods invariably more lax. See *id.* at 267. Rather, the difference between these communities lies mainly in the attitudes of their residents toward gangs. Juveniles in gang-ridden neighborhoods do not necessarily look up to gang members. Indeed, they are just as likely as those in relatively gang-free neighborhoods to resent gangs as violent and destructive. See Louis Harris & Assocs., Inc., *Between Hope and Fear: Teens Speak Out on Crime and the Community*, table 5-2, at 104 (1995). Nevertheless, those in gang-ridden neighborhoods *are* much more likely to believe that a *majority of their peers* admire gang members: whereas only 19% of juveniles in relatively gang-free communities believe that, 66% of those in gang-ridden ones do. *Ibid.*

These perceptions can reinforce themselves and ultimately determine the level of gang activity in a particular community. In relatively gang-free neighborhoods, the belief that others devalue gang membership strengthens the aversion that individual youths have toward joining them. But the belief of juveniles in gang-ridden neighborhoods that their peers admire gang members can make joining one seem worthwhile even to those only weakly committed (or opposed) to gangs. See D. Matza, *Delinquency and Drift* 54-56 (1964). Notwithstanding their private reservations, moreover, the decision of such individuals to join gangs conveys

publicly that they, too, value membership, a signal that reinforces the pressure on other teens to do the same. See *id.* at 52-59. This "system of shared misunderstanding" is one mechanism by which social norms fuel criminal gang activity. *Id.* at 53.

Another is the effect of visible gang activity on emotional dispositions. In a community pervaded by gang activity, residents are more likely to form the aggressive disposition that gang members themselves prize. The apparent authority and status of gang members imbues their mannerisms with connotations of strength. Indeed, the failure to imitate their demeanor can make one appear weak and vulnerable. See E. Anderson, *Streetwise: Race, Class, and Change in an Urban Community* 177-79, 181 (1990); M. Jankowski, *Islands in the Street: Gangs and American Urban Society* 28 (1991). As a result, individuals face strong pressure to cultivate the aggressive bearing associated with gang membership. When numerous individuals cultivate that bearing simultaneously, more of them are likely to turn to crime, both because of the (mis)information those mannerisms impart about public attitudes toward gang membership, and because of the obstacles they create to interactions with law-abiders, who strongly devalue aggression. See Anderson, *supra*, at 177-78, 189.

This social-norm account not only helps to explain why gangs exist, but also identifies which policies are likely to abate them. The conventional suppression strategy does not, in part because policies that severely punish gang activity may actually reinforce the norms that promote gang membership. Delinquency is status-enhancing because juveniles often view willingness to break the law as a sign of strength and courage. See, *e.g.*, W. Miller, *Lower Class Culture as a Generating Milieu of Gang Delinquency*, 14 J. Soc. Issues 5, 8-9 (1958). The more severe the penalty, the more strength law-breaking projects. Thus, the crackdown strategy is at war with itself.

A more effective approach is to attack the public signs and cues that inform juveniles' (mis)perception that their peers value

gang criminality. That is what Chicago is trying to achieve with the Ordinance. Other jurisdictions seek to produce the same effect through curfews or nuisance injunctions. See Livingston, *supra*, at 640-42. By preventing gangs from openly displaying their authority, these policing strategies counteract the perception that gang members enjoy a high status in the community. As that perception recedes, so does the reputational pressure to join them.

The suppression of open gang activity also positively influences the attitude and behavior of law-abiding members of the community. Like other forms of public disorder, gang activity drives some law-abiding citizens out of the community and others off the streets, thereby depriving the community of their stabilizing influence. See Anderson, *supra*, at 2-5, 58-59, 69-76; J. Jacobs, *The Death and Life of Great American Cities* 29-35 (1961). In addition, gang activity drives a wedge between the community and the police. When individuals understand gangs to be in control, they infer that cooperating with law-enforcement officials is likely to be both futile and dangerous. See G. Akerlof & J. Yellen, *Gang Behavior, Law Enforcement, and Community Values* in *Values and Public Policy* 173-84 (H. Aaron et al., eds., 1994). The reluctance of the community to turn on the gangs not only shields them from punishment but also legitimizes gang membership in the eyes of potential recruits. See Jankowski, *supra*, at 193-202. By counteracting perceptions that gangs control the community, gang-loitering laws and curfews give law-abiders the confidence they need to oppose gangs. Once the community withdraws its support for them, the perception of waning gang influence quickly becomes a reality. See *id.* at 201-02.

A growing body of evidence documents the effectiveness of the social-norm strategy for fighting gangs. Law-enforcement officials in Chicago, for example, report dramatic reductions in violent offenses in the neighborhoods where the Ordinance has been most vigorously enforced. See Meares, *Social Organization*, *supra*, at 225. Numerous other municipalities report the

effectiveness of curfews in reducing the incidence of juvenile victimization and juvenile crime. See Office of Juvenile Justice and Delinquency Prevention, U.S. Dept. of Justice, *Curfew: An Answer to Juvenile Delinquency and Victimization?*, Juvenile Justice Bulletin, April 1996, at 1, 3-9. Courts should respect the considered judgment of Chicago's lawmakers that the Ordinance embodies the most promising way to solve the persistent problem of gang criminality.

B. The Ordinance Places Minimal Restraints on Liberty

The Ordinance is carefully crafted to minimize any restraint on liberty. In fact, both because it serves as a substitute for severe punishments, and because it dissipates widely resented norms, the Ordinance may actually *enhance* liberty for many youths likely to be subject to the "move along" orders it authorizes. Moreover, both the Ordinance and its implementing regulations employ objective standards to limit police discretion and to provide gang loiterers with an opportunity to avoid any criminal sanction simply by obeying an order to move along.

1. The Ordinance is liberty-enhancing for the community at large and for youths who resent pressure to join gangs. In declaring that the Ordinance unconstitutionally abridges liberty, the Illinois Supreme Court focused *only* on the restraints that the Ordinance put on the behavior of gang members. As a result, it failed to consider the various ways in which the Ordinance actually *enhances* the liberty of the communities in which it is enforced. *Cf. Connecticut* v. *Doehr*, 501 U.S. 1, 11 (1991) (due process requires "due regard for any ancillary interest" of third parties).

First, the Ordinance enhances the liberty of community *residents* to use and enjoy their own streets. Gang crime and intimidation diminish the liberty not only of their victims, but also of community residents who must take costly and opportunity-sacrificing precautions to avoid becoming victims. Permitting gang members to camp out on city streets impedes the very liberties

invoked by the court below — to travel, to move freely, and to associate with others. People living in gang-infested neighborhoods who wish to walk along their streets and to associate with their neighbors have every right to do so free of threats, whether spoken or silent, and to expect the police to take measures to promote their safety and the integrity of their homes and businesses.

By seeking to prevent serious crime *before* it occurs, the Ordinance breaks the gangs' stranglehold on the streets, destroys their aura of invincibility, and disrupts their ability to commit more serious crimes. As the California Supreme Court recently observed, to forfeit the liberty of peaceful and industrious residents of a community "to preserve the illusion of freedom for those whose ill conduct is deleterious to the community as a whole is to ignore half the political promise of the Constitution and the whole of its sense." *People ex rel. Gallo* v. *Acuna*, 929 P.2d 596, 618 (Cal.), cert. denied, 117 S. Ct. 2513 (1997).

Second, the Ordinance liberates *community youth* from the intense pressure that *they* feel to join gangs. The vast majority of individuals join gangs *not* because they value gang membership intrinsically, but because they perceive (mistakenly) that their peers value it and (correctly) that failing to join can lead to deadly repercussions. See p. 22, *supra*. These impressions are formed and transmitted through the intimidating presence of gang members on neighborhood streets. See pp. 22-25, *supra*. By vanquishing this presence, the Ordinance relieves the pressure that drives youths into self-destructive gang criminality. Thus, it should come as no surprise that over 1,500 youths in Chicago have registered support for the Ordinance. See *1998 Resolution*, *supra*.

The Ordinance thus reflects a "combined interest in protecting both the community and *the juvenile himself* from the consequences of future criminal conduct." *Schall* v. *Martin*, 467 U.S. 253, 264 (1984) (emphasis added). It recognizes that society has a legitimate interest in protecting a juvenile from "the downward spiral of criminal activity into which peer pressure may lead the child." *Id.*

at 266. In that sense, it is liberty-enhancing, even with regard to many of the very persons likely to be its targets.

2. The ordinance is a liberty-conserving alternative to conventional "crack down" strategies for combating gangs. The Illinois Supreme Court's conclusion that the Ordinance exacts an unconstitutional toll on liberty also overlooks the liberty-destroying effects of severe punishment — the Ordinance's principal alternative. Legislatures commonly attempt to compensate for judicial restrictions on effective street-level policing by adopting even longer prison terms. R. Posner, *The Most Punitive Nation*, Times Literary Supp., Sept. 1, 1995, at 3, 4; W. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 Yale L.J. 1 (1997). Indeed, many inner-city residents support anti-loitering laws precisely because they see them as tolerably *moderate* alternatives to draconian punishment of minor drug offenses. See p. 17, *supra*. The kids whom the police can't order off the streets today, they realize, are the same ones they'll be carting off to jail tomorrow.

The identity of the Ordinance as an alternative to long prison terms goes to the heart of the interest that the Neighborhood Groups have in this case. As coercive as enforcing order on the streets can be, it pales in comparison to the disproportionate impact of incarceration on young African-American and other minority men.[14] The ironic consequence of judicial decisions invalidating the Ordinance and like forms of community policing would be a vast curtailment of individual liberty in the name of preserving it.

3. Objective criteria and political monitoring furnish safeguards against abuse. The Illinois Supreme Court held that the Ordinance was invalid *on its face*. A Due Process facial

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[14] See, *e.g.*, M. Mauer & T. Huling, *The Sentencing Project, Young Black Americans and the Criminal Justice System: Five Years Later 4* (1995) (finding one-third of African-American men are either imprisoned, on parole, or on probation).

challenge should be sustained only if "no set of circumstances exists under which the Act would be valid." *United States* v. *Salerno*, 481 U.S. 739, 745 (1987). That is clearly not the case here: the objective enforcement criteria specified by the Ordinance itself and by the police department's enforcement guidelines, combined with the community consultation procedures found in the regulations, reasonably constrain discretion. Considered against the backdrop of the community's own internalization of the effects of the Ordinance, these safeguards clearly satisfy Due Process. See Part I, *supra*; Livingston, *supra*, at 650-70.

Significantly, the Ordinance incorporates an objective standard against which to test the propriety of an officer's order to disperse. Such an order is authorized only if the officer "reasonably believes" that one or more members of a group of loiterers is a member of a criminal street gang. Pet. App. 61a. In addition, the terms "criminal street gang" and "loiter" are carefully defined to deter any over broad reading. *Id.* at 61a-62a. These provisions safeguard against any concerns about unfettered police discretion.

Such concerns should be further allayed by the Chicago Police Department's implementing guidelines, specifically adopted "to ensure that the anti-gang loitering is not enforced in an arbitrary or discriminatory way." Pet. App. 65a. Under those guidelines, the Ordinance may be enforced only by trained officers in certain "areas frequented by members of criminal street gangs" — as designated after consultation with community leaders and residents — thereby significantly limiting the scope of enforcement. Pet. App. 68a. Thus, the Ordinance and regulations permit criminal sanctions only based on "a prediction of future criminal conduct [that] is 'an *experienced* one based on a host of variables' that cannot be readily codified." *Schall*, 467 U.S. at 279 (emphasis added). Finally, the guidelines oblige the police to consult with community groups concerning implementation of the Ordinance

(Pet. App. 68a), thereby assuring effective and ongoing *political* oversight of the exercise of police discretion.[15]

Should this Court uphold the lower court's decision to invalidate the Ordinance, it will remit Chicago — not to mention other cities contemplating norm-focused strategies for combating gangs — to policing strategies that involve *even more* discretion. A reasonably close substitute for Chicago's invalidated gang-loitering law, for example, would be New York's strategy of order-maintenance policing. See generally G. Kelling & C. Coles, *Fixing Broken Windows: Restoring Order and Reducing Crime in Our Communities* (1996). The "public order" provisions at the base of that strategy — including laws against public drunkenness, prostitution, aggressive panhandling, jaywalking, and unlicensed street vending — are specific enough on their face to survive vagueness challenges. See Livingston, *supra*, at 615-16. Yet the officers who enforce these laws retain considerable latitude about whether to enforce them at all, and, if so, where and against whom. See *id.* at 609. Teen curfews invite considerable discretion as well. Distinguishing legitimate from abusive police behavior is thus much more difficult when a police department engages in general order-maintenance policing than it is under a gang-loitering ordinance like Chicago's, which, contrary to its apparent generality, jealously guards against the diffusion of enforcement authority. Indeed, New York's order-maintenance policing reportedly has generated a considerable increase in police-misconduct complaints. See D. Barry & D. Sontag, *Disrespect as Catalyst for Police Brutality*, N.Y. Times, Nov. 19, 1997, at A1.

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[15] The court below disregarded the Police Department's guidelines on the ground that they were not binding under state law. Pet. App. 16a. This was error. As this Court has made clear, courts can and should look to administrative constructions to determine, as a matter of federal constitutional law, whether a state statute is susceptible of valid applications sufficient to defeat a facial challenge. See, *e.g.*, *Village of Hoffman Estates* v. *The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 n.5 (1982) ("In evaluating a facial challenge to a state law, a federal court must, of course, consider any limiting construction that a state court *or enforcement agency* has proffered") (emphasis added).

CONCLUSION

Chicago's gang loitering ordinance represents a modest attempt to restore order to the city's streets while preserving the liberty of those most likely to bear the brunt of criminal law enforcement. The Ordinance enjoys the broad support of the communities where it is enforced, enhances the liberty of residents who lack other effective means of combating gang intimidation, and is responsibly crafted to constrain police discretion in its enforcement. To strike the Ordinance down on the basis that it is unduly "vague" or somehow interferes with Respondents' "fundamental right to loiter," as did the Illinois Supreme Court, would disserve the very communities the Due Process Clause of the Fourteenth Amendment was designed to serve.

The judgment of the Illinois Supreme Court should be reversed.

Respectfully submitted.

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